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Supreme Court, U.S.
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In The

Supreme Court of the United States

CLAYTON FRANK, Warden,
Halawa Correctional Facility; State of Hawaii,

Petitioners,

v.

WAYMAN KAUA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Inasmuch as the Hawaii Supreme Court's interpretation of the state's extended term sentencing statute requires an extension be predicated solely upon prior convictions, did the Ninth Circuit Court of Appeals err in ignoring this Court's well-established precedent that required the Ninth Circuit to defer to the state court's interpretation, and in vacating Petitioner's extended term sentence after finding a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) based upon its reexamination and rejection of the Hawaii Supreme Court's interpretation of state law?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are:

Wayman Kaua, prisoner

Clayton Frank, Warden, Halawa Correctional Facility; **State of Hawaii**

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
A. THE NINTH CIRCUIT'S DECISION FAILS TO FOLLOW OPINIONS OF THE SUPREME COURT AND CONFLICTS WITH AN OPINION OF ANOTHER CIRCUIT	8
1. The Ninth Circuit's Decision Fails to Follow Existing Supreme Court Opinions	8
2. The Ninth Circuit's Decision Conflicts with the Second Circuit's Approach to This Issue	19
B. THIS CASE INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE AND PRESENTS A COMPELLING OPPORTUNITY FOR THE COURT TO RESOLVE THESE IMPORTANT ISSUES	23

TABLE OF CONTENTS – Continued

Page

APPENDICES

Court of Appeals Opinion: *Kaua v. Frank*, 436 F.3d 1057 (9th Cir. January 11, 2006).....App. 1

District Court Order Granting Petitioner Wayman Kaua's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. Section 2254 published at: 350 F.Supp.2d 848 (D. Haw. December 9, 2004).....App. 11

Hawaii Supreme Court Opinion: *State v. Kaua*, 72 P.3d 473 (Haw. July 8, 2003).....App. 37

Court of Appeals Order Denying Petition for Rehearing En Banc (February 24, 2006).....App. 66

Judgment entered by the Ninth Circuit Court of Appeals on January 11, 2006.....App. 67

Hawaii Revised Statutes, Sections 706-606, 706-661 and 706-662 (1993 & Supp. 2004).....App. 68

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Blakely v. Washington, 542 U.S. 296 (2004) 17

Bouie v. City of Columbia, 378 U.S. 347 (1964) 15

Bradshaw v. Richey, 126 S.Ct. 602 (2005) 9

Brown v. Greiner, 409 F.3d 523 (2d Cir. 2005), cert. denied, 126 S.Ct. 1566 (2006) 7, 19, 21, 22

Cruz v. Miller, 255 F.3d 77 (2d Cir. 2001) 18

Estelle v. McGuire, 502 U.S. 62 (1991) 9, 15

Ewing v. California, 538 U.S. 11 (2003) 19

Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1997) 18

Hernandez v. Small, 282 F.3d 1132 (9th Cir. 2002) 15, 18

Malabed v. North Slope Borough, 335 F.3d 864 (9th Cir. 2003) 14

Mullaney v. Wilbur, 421 U.S. 684 (1975) 6, 15

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 15

Neal v. Puckett, 239 F.3d 683 (5th Cir. 2001) 18

North Carolina v. Butler, 441 U.S. 369 (1979) 9, 14

People v. Rivera, 833 N.E.2d 194 (N.Y. 2005), cert. denied, 126 S.Ct. 564 (2005) 20

Ring v. Arizona, 536 U.S. 584 (2002) 12

Schad v. Arizona, 501 U.S. 624 (1991) 14

Sims v. Rowland, 414 F.3d 1148 (9th Cir. 2005) ... 15, 16, 18

State v. Carvalho, 63 P.3d 405 (App. 2002) 9, 17, 22

TABLE OF AUTHORITIES – Continued

Page

State v. Miti Maugaotega, 114 P.3d 905 (Haw. 2005), petition for cert. filed, ___ U.S.L.W. ___ (U.S. October 27, 2005) (No. 05-7309) 10

State v. Okumura, 894 P.2d 80 (Haw. 1995) 6, 7, 17, 21, 22

State v. Rivera, 102 P.3d 1044 (Haw. 2004), cert. denied, 126 S.Ct. 45 (2005) ..... *passim*

State v. Vandergriff, 125 P.3d 360 (Alaska App. 2005) 12

State v. White, 129 P.3d 1107 (Haw. 2006) ... 10, 11, 13, 17, 22

United States v. Booker, 543 U.S. 220 (2005) 17

Van Lynn v. Farmon, 347 F.3d 735 (9th Cir. 2003) 16

Williams v. Taylor, 529 U.S. 362 (2000) 15

UNITED STATES CONSTITUTION

Amendment VI 1, 7, 17, 21, 22

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10(a) 24

Rule 13.3 1

FEDERAL STATUTES

28 U.S.C. Section 1254(1) 1

28 U.S.C. Section 1291 6

28 U.S.C. Section 2101(c) 1

28 U.S.C. Section 2253 ..... 1, 6

28 U.S.C. Section 2254 1

28 U.S.C. Section 2254(d)(1) 18

TABLE OF AUTHORITIES – Continued

Page

State Statutes
Hawaii Revised Statutes
Section 706-606 ..... 2, 13, 14
Section 706-606(2)(c) 22
Section 706-661 2
Section 706-662 2
Section 706-662(4) 5
Section 706-662(4)(a) ..... *passim*
Section 706-669 3

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Ninth Circuit Court of Appeals (App. 1) is reported at 436 F.3d 1057. The District Court's opinion (App. 11) is reported at 350 F.Supp.2d 848. The Hawaii Supreme Court's opinion (App. 37) is reported at 72 P.3d 473.

JURISDICTION

The Ninth Circuit filed its judgment on January 11, 2006. The basis for the Ninth Circuit to hear the State's appeal was *28 U.S.C. Section 2253(a)*. The jurisdiction of the district court was invoked under *28 U.S.C. Section 2254*.

A timely petition for rehearing en banc was denied on February 24, 2006. The present petition is timely filed under *28 U.S.C. Section 2101(c)* and under *Rule 13.3* of this Court. Petitioner, State of Hawaii Warden Clayton Frank ("State") seeks review of that judgment on a writ of certiorari. The jurisdiction of this Court rests on *28 U.S.C. Section 1254(1)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

> wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Hawaii's extended term sentencing scheme is set out, in relevant part, in the *Hawaii Penal Code, Chapter 706, Sections 706-606, 706-661 and 706-662 (1993 & Supp. 2004)* reprinted at App. 68.

STATEMENT OF THE CASE

Following a state jury trial, Kaua was found guilty on multiple felony counts. The trial court sentenced Kaua to an enhanced sentence of extended terms of imprisonment. Kaua challenged the extended prison terms on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) grounds in state court and on July 8, 2003, the Hawaii Supreme Court affirmed Kaua's sentence on *Apprendi* grounds. The federal district court granted Kaua's petition for writ of habeas corpus finding an *Apprendi* violation and the Ninth Circuit affirmed the granting of the writ holding that the state court decision was contrary to *Apprendi*.

The Crimes and the Indictment

This case arose out of a 1998 hostage stand-off between Kaua and Honolulu police officers during the execution of a warrant for Kaua's arrest on parole violations. After holding police at bay for almost twenty-four

hours, during which Kaua repeatedly fired an assault rifle in the direction of police and civilians in the neighborhood, the standoff finally ended when a police sharpshooter shot and injured Kaua.

The jury found Kaua guilty of nine felony offenses including, first degree attempted assault, first degree reckless endangering, attempted manslaughter, kidnapping, unlawful imprisonment, terroristic threatening, possession of firearms and ammunition, and use of a firearm in the commission of a felony.

Sentencing

The trial court sentenced Kaua to an extended term of imprisonment as a multiple offender under Hawaii's extended term sentencing statute *Haw. Rev. Stat. Section 706-662(4)(a)*. Kaua was sentenced on two class A felonies, two class B felonies and five class C felonies. The sentence on the class A felonies, was extended from an indeterminate twenty year term of imprisonment to life with the possibility of parole. The class B felonies were extended from ten years to an indeterminate term of twenty years and the class C felonies were extended from five years to an indeterminate term of ten years imprisonment. Ultimately, the Hawaii Paroling Authority determines a prisoner's release under the state's penal code. *Haw. Rev. Stat. Section 706-669*. With respect to Kaua's criminal past, the trial court considered Kaua's prior felony convictions, one of which involved a very similar hostage incident involving Kaua's use of a firearm. The trial court also noted that Kaua had a history of substance abuse and access to firearms and that his actions in the instant matter, of repeatedly firing his gun, an assault rifle, put

police and innocent bystanders in the neighborhood, including children, in danger. The trial court also considered Kaua's repeated failure to abide by the terms of probation and parole. The trial judge stated "Basically, [Kaua], I believe when I look at the factors and consider his character, his history, his attitude, and the need for a structured environment, I believe that it's necessary for the protection of the public to impose the extended terms. . . ." App. 45.

The State Appeal

The Hawaii Supreme Court affirmed Kaua's extended term sentence on *Apprendi* grounds. In interpreting the statute, the Hawaii Supreme Court held that, under *Haw. Rev. Stat. Section 706-662(4)(a)*, the sole determining factor that subjected Kaua to an extended term of imprisonment as a multiple offender was Kaua's prior convictions. The state court further ruled that the "necessary for the protection of the public" determination was not an *Apprendi* type fact that needed to be found by the jury. App. 64.

Federal Court Proceedings

On August 12, 2003, Kaua filed a federal habeas petition pursuant to *28 U.S.C. Section 2254* in the United States District Court of Hawaii. The district court granted the petition on *Apprendi* grounds and ordered the state court to immediately vacate Kaua's extended term. App. 36. The district court denied the State's request for a stay. *Id.* The district court's jurisdiction was invoked under *28 U.S.C. Section 2254.*

The Ninth Circuit Court of Appeals affirmed the granting of the writ, holding that although it was proper for the sentencing court to make the multiple felony finding (prior convictions), *Apprendi* required a jury, rather than the sentencing court, to find that an extended term sentence was "necessary for the protection of the public." App. 9. The Ninth Circuit ruled that the Hawaii Supreme Court applied a rule – "intrinsic-extrinsic" analysis – contrary to the rule that *Apprendi* announced. App. 9-10. The Ninth Circuit faulted the state court's determination that the "extrinsic" nature of the factual findings required for step two exempted them from *Apprendi's* reach, noting that *Apprendi* deemed irrelevant any such distinction and looked only to the effect and not the label the statute or court applied to the fact. The Ninth Circuit found the *Apprendi* rule to be in direct conflict with the state court's reasoning and noted that *Apprendi* exempted only one finding – the fact of a prior conviction – from the "general rule." App. 8-9.

The Ninth Circuit found that, (1) Hawaii courts have never characterized step two as anything other than the finding and evaluation of facts; and (2) The State's reading of *Section 706-662(4)*, therefore does not comport with the Hawaii Supreme Court's interpretation. The Ninth Circuit rejected what it characterized as the State's "alternative reason" for affirming the state court's decision, stating that it could not avoid granting the writ by positing an alternative reason for the state court's decision that is entirely distinct from the reason given by the state court, even if such different reason might have justified the state court's action. App. 5-6.

The Ninth Circuit concluded that the sentencing court's necessary for the protection of the public "finding"

coupled with the multiple felonies finding, exposed Kaua to a greater sentence than the jury's verdict authorized and thus the jury should have made the "necessary for the protection of the public" finding. App. 9. The Ninth Circuit relied in part upon an older state court decision, *State v. Okumura*, 894 P.2d 80 (Haw. 1995), in support of its ruling that the Hawaii Supreme Court has always required a two-step process.

The Ninth Circuit, holding jurisdiction under *28 U.S.C. Sections 1291 and 2253*, affirmed the granting of the writ. On February 24, 2006, the Ninth Circuit denied the State's petition for rehearing en banc. Judgment was entered on January 11, 2006.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case raises both issues of constitutional law and of habeas and AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996) case law that call out for resolution by this Court. Both questions implicate fundamental concerns about the role of the federal court in granting habeas relief, rejecting the state court's interpretation of a state sentencing statute and the constitutionality of the state's extended term sentencing scheme in light of *Apprendi*. The Ninth Circuit's decision not only threatens the state's extended term sentencing statute, and the extended sentences of many of the state's worst offenders but its decision was reached contrary to the well-established principle that a federal court defer to a state court's interpretation of a state statute. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (citation omitted). Finally, its decision conflicts with the

Second Circuit's approach in *Brown v. Greiner,* 409 F.3d 523 (2d Cir. 2005), *cert. denied,* 126 S.Ct. 1566 (2006).

The first question is whether Kaua's extended term sentence violated *Apprendi* as held by the Ninth Circuit. The second question is whether the Ninth Circuit erred in holding that the state court decision was contrary to *Apprendi.* In rejecting the state court's decision, the Ninth Circuit underscores its fundamental misunderstanding of the state decision. The Ninth Circuit's refusal to defer to a state court's interpretation of its statute is based in part on its erroneous reliance upon another state decision, *State v. Okumura*, 894 P.2d 80 (Haw. 1995), a case which was not only decided years before *Apprendi,* but also involved no Sixth Amendment claim. *Okumura* dealt only with the procedural aspects of extended term sentencing and not a substantive Sixth Amendment claim.

These are important issues and the Ninth Circuit's decision reflects not only an intra-circuit conflict as to the proper analysis of state court decisions under habeas and AEDPA law but it also highlights a conflict with a decision of the Second Circuit Court of Appeals in *Brown v. Greiner*, 409 F.3d 523 (2d Cir. 2005), *cert. denied,* 126 S.Ct. 1566 (2006) and the highest court of other states, such as New York. This Court should grant review to make clear that Kaua's extended term sentence did not run afoul of *Apprendi*, the state decision was not contrary to, or an unreasonable application of, this Court's decision in *Apprendi* and the Ninth Circuit erred when it failed to defer to the state court's interpretation of its own statute.

A. THE NINTH CIRCUIT'S DECISION FAILS TO FOLLOW OPINIONS OF THE SUPREME COURT AND CONFLICTS WITH AN OPINION OF ANOTHER CIRCUIT.

Apprendi has left quite a resounding wake both in state and federal courts since its inception in June 2000. To date, there have been thousands of cases litigated as a result of *Apprendi* and its progeny. Hawaii is no exception. Hawaii courts continue to face numerous challenges to the state's extended term sentencing scheme, and although it is well-established at the state level that the extended term sentencing statute and its manner of imposition is constitutional, the Ninth Circuit's decision has severely undermined the decisions of the Hawaii courts and jeopardized the state's ability to impose extended sentences.

1. The Ninth Circuit's Decision Fails to Follow Existing Supreme Court Opinions.

The Ninth Circuit has failed to follow existing Supreme Court precedent in two ways. First, it held that Kaua's extended term sentence violated *Apprendi*. In so holding, the Ninth Circuit highlights its misreading of *Apprendi*. Second, the Ninth Circuit completely rejected the state court's interpretation of a state statute contrary to well-established habeas and AEDPA case law. Rather than look to the state decision itself, a state case cited therein and subsequent case law that further elucidates the state court's interpretation of its statute, the Ninth Circuit ruled it was confined by the state court's "reasoning," namely its "intrinsic-extrinsic" rule. The Ninth Circuit's decision reflects that the state court's use of the nomenclature "intrinsic-extrinsic" in part of its analysis doomed the state court's decision from the outset.

The Ninth Circuit erred when it failed to look beyond that characterization and thus falls short of the required deference owed to state courts in the interpretation of a state statute. *North Carolina v. Butler,* 441 U.S. 369, 376 n.7 (1979); *Estelle v. McGuire,* 502 U.S. 62, 67-68, (1991) ("It is not the province of the federal court to reexamine state-court determinations on state-law questions."); *Bradshaw v. Richey,* 126 S.Ct. 602, 604 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). While the Hawaii Supreme Court did use the nomenclature "intrinsic-extrinsic," the Ninth Circuit fails to recognize that implicit in the state court decision is that the sole determinant in the imposition of an extended term sentence for purposes of *Haw. Rev. Stat. Section 706-662(4)(a)* is the prior convictions. App. 54-55, 62-63 citing *State v. Carvalho*, 63 P.3d 405, 419 (App. 2002) (ruling the sole determinant to an extended term as a multiple offender is the fact of a defendant's prior convictions).

Kaua's extended sentence was imposed pursuant to *Haw. Rev. Stat. Section 706-662(4)(a)*, the multiple offender statute.[1] The state court concluded in *Kaua* that it could not accept the contention that *Apprendi* mandates that a "multiple offender" determination must be made by the trier of fact where the facts foundational to *Kaua's* extended term [prior convictions] fell outside the *Apprendi* rule and thus the ultimate determination of whether he was a multiple offender whose extensive criminal actions

[1] Pursuant to *Haw. Rev. Stat. Section 706-662(4)(a)*, a defendant is a "multiple offender" if the defendant is "being sentenced for two or more felonies or is already under sentence of imprisonment for felony."

warranted extended prison terms was properly with the province of the sentencing court. App. 64. The Hawaii Supreme Court has explicitly and repeatedly reaffirmed that the sole determinant for imposition of an extended term pursuant to *Haw. Rev. Stat. Section 706-662(4)(a)* is a defendant's prior felony convictions. *See, State v. Rivera*, 102 P.3d, 1044 (Haw. 2004), *cert. denied*, 126 S.Ct. 45 (2005) and *State v. White*, 129 P.3d 1107 (Haw. 2006).[2] In both *Rivera* and *White*, the supreme court made it even more explicit, under Hawaii law, that the sole determining factor that subjected a defendant to an extended term sentence as a multiple offender was the defendant's prior and multiple convictions, and the finding that an extended term was necessary for the protection of the public – a determination that sentencing courts make in rendering any sentence – could not be made unless the defendant had prior or multiple felonies. It is inconsequential that the Hawaii statute requires the court to specify factual findings to support its opinion that an extended term is warranted, because the Hawaii statute leaves it entirely to the court to determine what findings it deems relevant to the question whether an extended term is warranted. Thus, the findings under the statute are merely incidental to the court's discretionary determination of an appropriate sentence within the statutory range.

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[2] This Court recently denied a petition for certiorari on an *Apprendi* challenge to Hawaii's extended term statute in *State v. Rivera*, 102 P.3d 1044 (Haw. 2004), *cert. denied*, 126 S.Ct. 45 (2005). At the present time, another state court decision is pending certiorari in the U.S. Supreme Court, *State v. Miti Maugaotega*, 114 P.3d 905 (Haw. 2005), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. October 27, 2005) (No. 05-7309).

In any case, the Hawaii Supreme Court's decision rejecting Kaua's *Apprendi* claim was neither contrary to, nor involved an unreasonable application of, *Apprendi*. Given the substantial differences between the Hawaii statutes and the statutes at issue in *Apprendi*, it was reasonable for the Hawaii Supreme Court to conclude that *Apprendi* did not invalidate the Hawaii statute. In sum, the Hawaii Supreme Court holds that, under *Haw. Rev. Stat. Section 706-662(4)(a)*, it is a defendant's prior felony convictions that are the essential "facts" that subject him to, and allow the court to impose, extended terms of imprisonment. App. 63-64. As such, the decision did not conflict with the rule of *Apprendi*.

Obviously, the Ninth Circuit did not believe the state court made clear that the sole determinant was the prior conviction, but the state's argument, which the Ninth Circuit rejected, has been validated by the Hawaii Supreme Court in decisions subsequent to *Kaua*. *See*, *Rivera*, 102 P.3d at 1061, and *White*, 129 P.3d at 1112-13. In the face of further *Apprendi* challenges the state court reaffirmed and clarified what it meant in *Kaua*, *i.e.*, in its interpretation of the statute, *Haw. Rev. Stat. Section 706-662(4)(a)*, the sole determinant rendering a defendant eligible for an extended term is the prior felony convictions. *See*, *Rivera*, 102 P.3d at 1044 and *White*, 129 P.3d at 1117. When the sentencing court goes on to determine whether an extended term is "necessary for the protection of the public" the court is in effect exercising its discretion as to whether in its "opinion" an extended term is warranted. Even if it has been termed a "finding" in previous state court decisions or even the statute itself, that label does not in and of itself render it an *Apprendi*-type fact. The fact that the state supreme court used the labels

"intrinsic-extrinsic" in part of its analysis does not thereby transform "necessary for the protection of the public" into an *Apprendi* type fact. If, as *Ring v. Arizona,* 536 U.S. 584, 605 (2002) states, the "characterization of a fact or circumstance and an 'element' or 'sentencing factor' is not determinative of the question of 'who decides, judge or jury' ", then it is only fair that the state court's nomenclature "intrinsic-extrinsic" not be used against it in the granting of the writ. Once having determined a defendant has the requisite prior convictions, the sentencing court exercises its discretion in imposing an extended term or it may likewise reject such a sentence.[3] For the Ninth Circuit to declare that the state court's decision is based only on an "intrinsic-extrinsic" test is wrong. There is nothing to support the claim that the test was the sole measure of the state court's reasoning and decision. The fair import of the state's decision is that prior convictions justified the imposition of an extended term, and the determination that an extended term of imprisonment was "necessary for the protection of the public" – a determination that

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[3] The determination required by the statute, "necessary for the protection of the public" does not turn on any factual aspect of a defendant's present offenses. Although a judge may mention or even rely on the facts of those offenses, the ultimate question in not one of historical fact. Hawaii case law requires a sentencing judge to explain his conclusions regarding the proper sentence. This is so it can be reviewed at the appellate level for reasonableness. It is not an *Apprendi* type fact, *i.e.*, an historical fact, but rather is a "weighing of imponderables and partly a prediction of the defendant's future behavior, based on the judge's assessment of the underlying causes of the defendant's criminal behavior, the defendant's likelihood of recidivism, and the defendant's amenability to rehabilitative efforts. In other words, this finding does not look like any of the findings that are traditionally entrusted to the jury. . . ." *State v. Vandergriff*, 125 P.3d 360, 371 (Alaska App. 2005) (*Mannheimer, J., concurring*).

sentencing courts make in rendering *any* sentence – could not be made "unless" a defendant has prior felony convictions.[4] "The factor that justifies the enhancement of the sentence to extended prison terms, therefore, is the fact of a prior conviction." *Rivera*, 102 P.3d at 1060-61. As the Hawaii Supreme Court stated in reaffirming *Kaua*, "It is erroneous to think that the 'necessary for the protection of the public' requirement has any greater effect at extended term sentencing than it does at ordinary sentencing." *White*, 129 P.3d at 1117. But for the fact of the prior or multiple convictions, there would be no basis for extended prison terms. *Id. Haw. Rev. Stat. Section 706-662(4)(a)* authorizes a judge to impose an extended term upon a finding that the defendant committed a previous felony and without that finding, notwithstanding that such a sentence may be considered "necessary for the protection of the public," a judge would not be authorized to impose it. *Id.* The fact that the state court discussed an "intrinsic-extrinsic" test in its reasoning should not negate its ultimate holding that the prior convictions was the sole determining factor that set the extended term.

Even if the Ninth Circuit disagrees with how the state court characterized the "necessary for the protection of the public" step, it cannot simply ignore the state court's ruling that the prior convictions are the sole determinant. Because the state court's holding based upon its interpretation of its statute suffices, its decision, which must be

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[4] *Haw. Rev. Stat.* Section 706-606 **Factors to consider in imposing a sentence**, mandates that every sentencing court in determining the sentence to be imposed, consider a number of different factors, one of which is, "To protect the public from further crimes of the defendant[.]"

viewed under the deferential AEDPA standard, is not contrary to, or an unreasonable application of *Apprendi.*

In *State v. Rivera*, 102 P.3d 1044 (Haw. 2004), the Hawaii Supreme Court was required to interpret the same statute, *Haw. Rev. Stat. Section 706-662(4)(a)* and held that "the *sole* factor, beyond those already enumerated in HRS § 706-606 and already considered by the sentencing court, which extends an indeterminate prison term pursuant to HRS § 706-662(4)(a), is the fact that a defendant is a multiple offender." *Supra,* 102 P.3d at 1061. The rule of *Apprendi* does not bar "prior convictions" as a basis for which a sentencing court may exercise its discretion and impose an extended term of incarceration. Therefore, the Ninth Circuit's contention that the sentencing court could not have imposed the extended term of incarceration without "findings to support necessity for protection of the public" is incorrect. There is no basis in the state court's decision to support the Ninth Circuit's decision.

As the interpretation of the statute by the highest judicial tribunal in the State of Hawaii comports with the rule of *Apprendi*, the federal courts should defer to the Hawaii Supreme Court's interpretation of local law. *See, Malabed v. North Slope Borough*, 335 F.3d 864, 868 (9th Cir. 2003) (quoting *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990)) (observed that "[w]hen interpreting state law, a federal court is bound by the decision of the highest state court"); *see also, e.g., North Carolina v. Butler*, 441 U.S. 369, 376, n.7 (1979); *Schad v. Arizona*, 501 U.S. 624, 636 (1991) ("In cases . . . involving state criminal statutes . . . [i]f a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of a

crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law[.]" This Court has stated that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Only in rare cases will this Court re-examine a state court's interpretation of state law. *Mullaney v. Wilbur*, 421 U.S. at 691 n.11 (citations omitted). Such cases involve an "obvious subterfuge to evade consideration of a federal issue[,]" (*Ibid.*); or, that "[t]he purported state-law ground was so novel, in our independent estimation, that 'petitioner could not fairly be deemed to have been apprised of its existence[,]" (*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456-57 (1958)); or, the state supreme court's "interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process." *Bouie v. City of Columbia*, 378 U.S. 347, 361-62 (1964). As none of these concerns is present here, the Ninth Circuit erred in not deferring to the state court's interpretation of its statute.

A state court's decision is "contrary to" clearly established law either (1) if it fails to apply the correct controlling authority, or (2) if it applies the controlling authority to a case involving facts "materially indistinguishable" from those in a controlling case, but nonetheless reaches a different result." *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000). Neither of these describes the state decision in this case. The Ninth Circuit's decision reveals that it misconstrued Hawaii law and highlights an intra-circuit conflict in the area of habeas and AEDPA case law. *See*, *Sims v. Rowland*, 414 F.3d 1148, 1152 n.2 (9th Cir. 2005) comparing *Hernandez v. Small*, 282 F.3d 1132 (9th Cir. 2002) and

Van Lynn v. Farmon, 347 F.3d 735 (9th Cir. 2003). This has particular significance to the instant case because of the manner in which the Ninth Circuit affirmed the granting of the writ which appears to focus and rely solely on one aspect of the state court's *reasoning*.

In *Sims*, a panel of the Ninth Circuit recognized an intra-circuit conflict with respect to its habeas review of state decisions, "We note some latent confusion in our case law concerning whether under AEDPA, it is necessary or permissible for us to review the "reasoning" used by the state court, or whether we are simply to review the decision of that court adjudicating the merits of the petitioner's claim." *Sims*, 414 F.3d at 1152, n.2. The *Sims* court stated, "To our knowledge, the Supreme Court has never granted habeas relief solely on the basis of the "reasoning" used by the state court. . . . It is one thing for a state court *decision* to conflict with the Supreme Court's *reasoning*; it is quite another to criticize the state court's reasoning irrespective of whether its *decision* conflicts with Supreme Court precedent." *Sims*, 414 F.3d at 1152, n.2.

Here, the Ninth Circuit held that *Apprendi* required a jury, rather than a sentencing court, to find that an extended term sentence was "necessary for the protection of the public." The Ninth Circuit stated that it could not avoid granting the writ by "positing an alternative reason for the state court's [decision] that is entirely distinct from the reason given by the state court, even if such different reason might have justified the state court's action." App. 5-6. Here, there was no "alternative rationale" that was "entirely distinct" from that of the state court. The Ninth Circuit ignored the state decision and subsequent case law illustrative of how the state court has attempted to reconcile *Apprendi* and its progeny with its extended term

sentencing statute. The Ninth Circuit focuses solely on one aspect of the state court's *reasoning* ("intrinsic-extrinsic") without examining the *decision* itself, nor the state court's reliance upon the *Carvalho* decision and the state court's subsequent *Rivera* and *White* decisions which affirmed extended term sentences in the face of *Apprendi*, *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005) challenges. One does not have to look beyond the state's decision in *Kaua* to see that it has always found the prior convictions to be the sole determinant. App. 63-64. The Ninth Circuit's reference to, and reliance upon, an older decision of the state court, *State v. Okumura*, 894 P.2d 80 (Haw. 1995), evidences the Ninth Circuit missed the mark. That decision was not decided on the basis of a Sixth Amendment *Apprendi* challenge and as such it should not control federal habeas review in the instant case.

The Ninth Circuit states that Hawaii courts have never characterized step two as anything other than the finding and evaluation of facts but by the same token, and more importantly, the Ninth Circuit's rationale does not comport with the Hawaii Supreme Court's interpretation which has never found it to be an *Apprendi*-type fact. The Ninth Circuit faulted the Hawaii Supreme Court's *reasoning* that the "extrinsic" nature of the factual findings required for step two exempted them from *Apprendi's* reach, noting that *Apprendi* deemed irrelevant any such distinction and looked only to the effect and not the label the statute or court applied to the fact. The Ninth Circuit determined the rule to be in direct conflict with the Hawaii Supreme Court's reasoning and noted that *Apprendi* exempted only one finding – the fact of a prior conviction – from the "general rule."

On federal habeas review of a claim adjudicated on the merits by a state court, what matters is whether the decision reached by the state court was contrary to controlling federal law; intricacies of a state court's analysis are irrelevant. *Hernandez*, 282 F.3d at 1140. The Ninth Circuit notes that the state court conducted an "intrinsic-extrinsic" analysis contrary to the rule of *Apprendi*. While that nomenclature may at first blush appear inconsistent with *Apprendi*, what matters is whether the *decision* is contrary to *Apprendi*. *See, Hernandez*, at 1140 citing 28 USC Section 2254(d)(1); *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (noting that in habeas proceedings, "we are determining the reasonableness of the state court's decision not grading their papers."); *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001) ("It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's decision and not the written opinion explaining the decision."). Deficient reasoning should not preclude AEDPA deference. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) (*Posner, C.J.*) (explaining that scrutinizing state courts' methods of reasoning "would place the federal court in just the kind of tutelary relation to the state courts that [AEDPA was] designed to end").

Importantly, *Sims* recognized that the Supreme Court has never granted habeas relief solely on the basis of the "reasoning" used by the state court, and concluded that, "It is one thing for a state court *decision* to conflict with the Supreme Court's *reasoning*; It is quite another to criticize the state court's reasoning irrespective of whether its *decision* conflicts with supreme court precedent." *Sims*, 414 F.3d at 1152 n.2. Here, the Ninth Circuit decision directly conflicts with well-established habeas and AEDPA

case law, clearly an issue of exceptional importance that this Court should resolve.

2. The Ninth Circuit's Decision Conflicts with the Second Circuit's Approach to this Issue.

The Ninth Circuit decision also conflicts with a decision of the Second Circuit Court of Appeals in *Brown v. Greiner*, 409 F.3d 523 (2d Cir. 2005), *cert. denied,* 126 S.Ct. 1566 (2006), in which the Second Circuit examined a New York state sentencing statute similar to Hawaii's extended term statute.[5] New York's persistent felony offender statute also has two steps, the first of which requires a determination that a defendant has the requisite prior felony convictions and the second is simply a determination by the sentencing court that such a sentence is "will best serve the public interest." The New York state appellate court held that the sole determinant for whether a defendant is subject to persistent felony offender sentencing is the prior convictions. After the government has proven a defendant is a twice-prior convicted felon, the sentencing court may review the history, character and criminality factors to determine whether to impose the sentence. The statutory framework makes it clear that the prior convictions are the sole determinant of whether a defendant will be subject to recidivist sentencing. After

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[5] An extended term provides greater penalties for career criminals and serial transgressors while providing discretion within the sentencing system to avoid concerns of harshness sometimes expressed by critics of "three strikes" laws. "Three strikes" is a term applied to State laws which require long mandatory sentences for a third felony conviction. *See, Ewing v. California*, 538 U.S. 11 (2003). Like New York, Hawaii's extended term law is of earlier origin, and its existence may have restrained both states from following the national trend.

determining the defendant's status as persistent felony offender, the New York court went on to consider other facts in weighing whether to impose the persistent felony sentence.

On appeal, the Second Circuit reversed the granting of a writ of habeas corpus, holding the application of the persistent felony offender statute involves only a "vague, amorphous assessment of whether, in the court's 'opinion,' 'extended incarceration and life-time supervision' of the defendant 'will best serve the public interest' – an inquiry the Second Circuit determined to be quite different from the fact-finding addressed in *Apprendi*." 409 F.3d at 534-35. The second determination is of a very different sort than that in *Apprendi*, one that is quite different from the precise finding of a specific fact. *Id.* The New York statute, as Hawaii's, does not enumerate any specific facts that must be found before the sentencing court can conclude an extended sentence is in the public's "best interest." The Hawaii Supreme Court has never read the statute to require judicial fact-finding as to the defendant's character and criminal acts before he becomes eligible for an extended term sentence. The law was not read that way and under the state court's interpretation of the relevant statutes, a defendant is eligible for such sentencing based solely on prior convictions. This conclusion takes it outside the scope of the violations described in *Apprendi*.[6]

[6] The New York court aptly noted that, "by authorizing a hearing on facts relating to defendant's history and character, does not grant defendants a legal entitlement to have those facts receive controlling weight in influencing the court's decision. The statutory language requiring the sentencing court to consider the specified factors and to articulate the reason for the chosen sentence grants defendants a right to an airing and explanation, not a result." *People v. Rivera*, 833 N.E.2d

(Continued on following page)

The Ninth Circuit distinguished *Brown* noting that, contrary to the Hawaii Supreme Court, the New York appellate courts have determined that the sole determinative factor to the imposition of an enhanced sentence was a defendant's prior felony convictions and when the court then went on to determine whether it "will best serve the public interest" it was only exercising its discretion. The Ninth Circuit found the Hawaii Court's interpretation of its statute "arguably distinguishes" it from *Brown*. The Ninth Circuit's position that the Hawaii Supreme Court did not articulate such a reason confirms that it misread the state court decision.

The Ninth Circuit attempts to distinguish the Second Circuit's *Brown v. Greiner* decision and the New York Statute by stating, "In contrast to the New York Court of Appeals, the Hawaii Supreme Court "repeatedly" required a two-step sentencing process, and "the Hawaii Supreme Court stated that both steps of the process 'must be followed' when the prosecution seeks an extended sentence." App. 7. What the Ninth Circuit fails to recognize is that the *Okumura* court did not address a Sixth Amendment challenge because no Sixth Amendment challenge was raised, rather the *Okumura* court dealt strictly with the procedural aspects of the extended term statute. It is clear from *Okumura* that the reason the sentencing court's public protection determination must be stated on the record is so that a reviewing court can determine whether

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194 (N.Y. 2005), *cert. denied*, 126 S.Ct. 564 (2005). Likewise, Hawaii court decisions require a sentencing court to support its opinion that an extended term "is necessary for the protection of the public" so that an appellate court can engage in a meaningful review of the sentence. *State v. Okumura*, 894 P.2d 80, 110 (Haw. 1995).

the sentencing court properly exercised its discretion. Indeed, a sentencing court must make this public protection determination in *every* case. *See, Haw. Rev. Stat. Section 706-606(2)(c).* Significantly, in cases dealing with the procedure or fair imposition of extended terms, the Hawaii Supreme Court was never faced with – and thus never addressed – the issue as to what particular facts actually subjected a defendant to an extended term of imprisonment under an *Apprendi* Sixth Amendment analysis. The Hawaii Intermediate Court of Appeals was the first to do so in *State v. Carvalho,* 63 P.3d 405 (Haw. App. 2002), a case cited to and affirmed by the Hawaii Supreme Court in *Kaua.* Since *Okumura*, the Hawaii courts have conducted substantive Sixth Amendment analyses on Hawaii's extended term statute. *See, Carvalho, Rivera, and White, supra.*

The Ninth Circuit's second basis for distinguishing *Brown* was that it disagreed with the Second Circuit's determination that the "best interest of the public" determination in New York's persistent felony offender statute did not have to be found by a jury because it believed that to likewise be in violation of *Apprendi*. App. 7-8. The Ninth Circuit would have decided that case in the petitioner's favor as well, contrary to the Second Circuit's decision on the issue and well-established law that a federal court defer to a state court's interpretation of a state statute. The Ninth Circuit's decision in *Kaua* clearly presents not only an inter-circuit conflict but is also a question of fundamental importance for its far-reaching effect on this state's ability and the ability of other states to sentence the worst offenders to extended terms.

B. THIS CASE INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE AND PRESENTS A COMPELLING OPPORTUNITY FOR THE COURT TO RESOLVE THESE IMPORTANT ISSUES.

The Ninth Circuit's decision that Kaua's extended term sentence violates *Apprendi,* involves a question of exceptional importance that only this Court can resolve once and for all. It is imperative that this Court examine the Ninth Circuit's decision as it is fundamentally flawed in both its reasoning and result. There can be no doubt that if this decision is left to stand it will effectively and permanently eliminate not only Kaua's extended term, but will eliminate the sentences of many other state prisoners and will do so without a firm basis in the law.

The Ninth Circuit's view that the "necessary for the protection of the public" determination runs afoul of *Apprendi* because it requires the court to make a "factual finding" that a jury must make is simply wrong. Not only does the Ninth Circuit's decision fail to comport with a fair reading of *Apprendi* it is also in direct conflict with a decision of the Second Circuit Court of Appeals. It fails to recognize that the Hawaii Supreme Court held that it is the prior convictions that render a defendant eligible for an extended term sentence, at which point it is then up to the sentencing court, in the exercise of its discretion, as to whether an extended sentence is "necessary for the protection of the public." Not only is the Ninth Circuit's reasoning and decision contrary to *Apprendi* and the Hawaii Supreme Court's interpretation of a state statute but it is also in direct conflict with the decisions of other state appellate courts across the nation, such as New York and Alaska. One of the considerations in granting certiorari is whether a federal court of appeals has "decided an important federal question in a way that

conflicts with a decision by a state court of last resort." U.S. Supreme Court Rule 10(a). This case meets that criterion.

The Ninth Circuit has now upended a state sentencing statute, which has been on the books for over thirty years. Its decision will have the effect of establishing a completely unworkable sentencing scheme that will paralyze the ability of this state and other states to impose extended terms against the very worst felony offenders. Nowhere has this Court dictated a result such as this based on *Apprendi*. If left to stand, the decision will continue to severely undermine the ability of states to utilize this type of sentencing option. This case presents a compelling vehicle for this Court to resolve these important questions of constitutional law and habeas and AEDPA case law.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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436 F.3d 1057

United States Court of Appeals, Ninth Circuit.
Wayman KAUA, Petitioner-Appellee,
v.
Clayton FRANK, Warden, Halawa Correctional Facility; State of Hawaii, Respondents-Appellants.
No. 05-15059.

Argued and Submitted Dec. 5, 2005.
Filed Jan. 11, 2006.

Peter B. Carlisle, Prosecuting Attorney, and Loren J. Thomas, Deputy Prosecuting Attorney, Honolulu, HI, for the respondents-appellants.

Peter C. Wolff, Jr., Federal Public Defender, Honolulu, HI, for the petitioner-appellee.

Appeal from the United States District Court for the District of Hawaii; Susan Oki Mollway, District Judge, Presiding, D.C. No. CV-03-00432-SOM/BMK.

Before TROTT, T.G. NELSON, and PAEZ, Circuit Judges.

T.G. NELSON, Circuit Judge.

Appellants, the State of Hawaii and Clayton Frank,[1] appeal the Hawaii district court's grant of Wayman Kaua's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, and we affirm. The Hawaii sentencing court found that an extended sentence was necessary to protect the public in Kaua's case. Because the effect of this finding was to increase Kaua's sentence above that authorized by

[1] Henceforth, we refer to the appellants collectively as "the State."

the jury's guilty verdict, we hold that *Apprendi v. New Jersey*[2] required a jury to make the finding. In reaching the opposite conclusion, the Hawaii Supreme Court applied a rule – the "intrinsicextrinsic" analysis – contrary to the rule that *Apprendi* announced. The district court properly granted the writ.

BACKGROUND

In 1999, Kaua was indicted in state court in connection with a hostage standoff.[3] A jury acquitted Kaua of attempted murder in the first degree, but convicted him of several other offenses. These offenses included class-A felonies carrying twenty-year maximum sentences, class-B felonies carrying ten-year maximum sentences, and class-C felonies carrying five-year maximum sentences.

After the jury returned its guilty verdict, the prosecution moved to extend Kaua's sentence pursuant to Hawaii Revised Statutes section 706-662(4)(a). That section provides for an extended sentence if "[t]he defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public."[4] The section further provides that a court must find that "[t]he defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for [a] felony" in order to impose an extended sentence.[5]

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[2] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[3] A full description of the crimes of which Kaua was convicted may be found in *State v. Kaua*, 102 Hawai'i 1, 72 P.3d 473 (2003).

[4] Haw.Rev.Stat. § 706-662(4).

[5] *Id.* at § 706-662(4)(a).

The Hawaii Supreme Court has ruled that section 706-662(4) requires the sentencing court to conduct a two-step process.[6] First, the court must find that the defendant falls within the class of "multiple offenders" subject to an extended sentence.[7] Under section 706-662(4)(a), this first step requires the court to find that the defendant is being sentenced for two or more felonies, or is already under sentence of imprisonment for a felony. Second, the court must determine whether an extended sentence is necessary for the protection of the public.[8]

After following the required two-step process, the sentencing court granted the prosecution's motion to extend Kaua's sentence. The court found that Kaua's prior conviction for being a criminal in possession of a firearm and ammunition and his new convictions satisfied section 706-662(4)(a). The court then found a number of specific facts, and from these facts determined that an extended sentence was necessary to protect the public. These facts included Kaua's history of substance abuse; his abuse of drugs shortly before the hostage standoff; his history of assaultive behavior; his inability to control his behavior while under the influence or while under stress; his access to firearms; his lack of experience using the weapon with which he perpetrated the standoff; and the strong possibility that he could have injured minors and innocent bystanders because of his inexperience.

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[6] *State v. Okumura*, 78 Hawai'i 383, 894 P.2d 80, 109 (1995); *State v. Schroeder*, 76 Hawai'i 517, 880 P.2d 192, 202-03 (1994).

[7] *Schroeder*, 880 P.2d at 202-03.

[8] *Id.* at 203 & n. 17.

The court then sentenced Kaua. It extended the sentence for each of the class-A felonies from the maximum twenty-year term to life imprisonment with the possibility of parole.[9] The court extended Kaua's class-B felonies from maximum ten-year terms to twenty-year terms.[10] Finally, it extended Kaua's class-C felonies from five-year terms to ten-year terms.[11] The court ordered Kaua's sentences to run concurrently.

Kaua filed a timely notice of appeal with the Hawaii Supreme Court on February 28, 2000. On June 26, 2000, the United States Supreme Court decided *Apprendi*. Almost one year later, on May 1, 2001, the Hawaii Supreme Court affirmed Kaua's judgment of conviction and sentence. Although *Apprendi* already had been decided, Kaua had not briefed the case or raised any *Apprendi* issues in his direct appeal. Thus, the Hawaii Supreme Court did not address *Apprendi* when it affirmed Kaua's sentence.

On March 13, 2002, Kaua filed a Hawaii Rule of Penal Procedure 35 motion[12] with the state trial court for correction of his sentence based on *Apprendi*. The trial court denied his motion. Kaua timely appealed to the Hawaii Supreme Court, which addressed Kaua's *Apprendi* claim and affirmed the trial court's denial in a published opinion.[13] On August 12, 2003, Kaua filed a habeas corpus

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[9] *See* Haw.Rev.Stat. §§ 706-659, -661(2).

[10] *See* Haw.Rev.Stat. §§ 706-660(1), -661(3).

[11] *See* Haw.Rev.Stat. §§ 706-660(2), -661(4).

[12] Haw. R. Penal P. 35 ("The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.").

[13] *State v. Kaua*, 102 Hawai'i 1, 72 P.3d 473 (2003).

petition in federal district court in Hawaii to vacate his sentence pursuant to 28 U.S.C. § 2254. The district court granted his petition, holding that the Hawaii Supreme Court's affirmance of his sentence was contrary to, and an unreasonable application of, *Apprendi*. The State timely appealed the district court's grant of the petition.

ANALYSIS

I. Standards of review

We review de novo the district court's grant of Kaua's petition for writ of habeas corpus.[14] Under 28 U.S.C. § 2254(d)(1), a federal habeas petitioner can prevail only if he can show that the state court's adjudication of his claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established" Supreme Court case law.[15] "Clearly established" law is the "governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision."[16] A state court decision is "contrary to" clearly established law if the court "'applies a rule that contradicts the governing law set forth in [Supreme Court] cases.'"[17] "We cannot avoid granting the writ . . . by positing an alternative reason for the state court's [decision] that is entirely distinct from the reason given by the state court, even if

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[14] *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir.2003).

[15] 28 U.S.C. § 2254(d)(1).

[16] *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

[17] *Id.* at 73, 123 S.Ct. 1166 (quoting *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

such different reason might have justified the state court's action."[18]

II. The Hawaii Supreme Court's decision was contrary to *Apprendi*

Kaua challenges the Hawaii Supreme Court's conclusion that *Apprendi* permits a judge, rather than a jury, to find the facts required to satisfy step two of section 706-662(4)'s sentencing process.[19] The second step requires a sentencing judge to determine if extending the defendant's sentence is necessary for the protection of the public.[20] This inquiry requires the court to find facts outside of those found by the jury that expose the defendant to an increased sentence.[21] Because *Apprendi* held that any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt,[22] we agree with Kaua that a jury must find the facts required to satisfy step two.

The State argues that the public protection finding of step two is discretionary. In the State's view, the sentencing court's finding that a defendant has been convicted of

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[18] *Van Lynn v. Farmon*, 347 F.3d 735, 737 (9th Cir.2003).

[19] The State does not dispute that *Apprendi* applies to Kaua's case and that Kaua exhausted his state remedies.

[20] *Schroeder*, 880 P.2d at 203 & n. 17.

[21] *See Kaua*, 72 P.3d at 484-85 ("[T]he facts at issue in rendering an extended term sentencing determination under [section 706-662(4)] implicate considerations completely 'extrinsic' to the elements of the offense with which the defendant was charged and of which he was convicted.").

[22] *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348.

prior felonies alone subjects the defendant to an extended sentence. Because *Apprendi* exempted the fact of a prior conviction from its ambit, the State contends that the state court's application of section 706-662(4) was constitutional.

Contrary to the State's arguments, however, Hawaii courts repeatedly have interpreted section 706-662(4) to require a two step process.[23] In *State v. Okumura,* the Hawaii Supreme Court stated that both steps of the process "*must* be followed" when the prosecution seeks an extended sentence.[24] Hawaii courts never have characterized step two as anything other than the finding and evaluation of facts.[25]

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[23] *See, e.g., Okumura,* 894 P.2d at 109; *Schroeder,* 880 P.2d at 202.

[24] *Okumura,* 894 P.2d at 109 (emphasis added); *see also id.* at 110 ("After the first step of th[e] process has been completed and the defendant has been found by the court to be within the class of offenders specified by the particular subsection, the court *must determine* . . . that the defendant's commitment for an extended term is necessary for the protection of the public.") (internal quotation marks omitted) (omission in original) (emphasis added).

[25] *See, e.g., id.* at 110 (requiring the judge to "enter into the record all *findings of fact*" that underlie the decision that an extended sentence is necessary for the protection of the public) (emphasis added).

The Hawaii Supreme Court's interpretation of section 706-662(4) arguably distinguishes that statute from New York's persistent felony offender statute, which was at issue in *Brown v. Greiner,* 409 F.3d 523 (2d Cir.2005), *petitions for cert. filed,* U.S.L.W. (U.S. Aug. 17, 2005) (No. 05-6789), U.S.L.W. (U.S. Oct. 14, 2005) (No. 05-7035). Although the language of the two statutes is nearly identical, the Court of Appeals of New York has explained that "prior felony convictions are the *sole determinate* of whether a defendant is subject to enhanced sentencing as a persistent felony offender." *People v. Rosen,* 96 N.Y.2d 329, 728 N.Y.S.2d 407, 752 N.E.2d 844, 847 (2001) (emphasis added). Furthermore, that court has interpreted the second determination, that the public interest will be served by an extended sentence, not as a factual finding but as "a vague, amorphous assessment" or "opinion." *Brown,* 409 F.3d at 534 (internal quotation marks omitted). Based on the

(Continued on following page)

The State's reading of section 706-662(4), therefore, does not comport with the Hawaii Supreme Court's interpretation. In any case, the Hawaii Supreme Court did not base its dismissal of Kaua's Rule 35 motion on the arguments that the State advances. Because our review is limited to the "reason[s] given by the [Hawaii] court," we cannot adopt the State's "alternative reason" for affirming the Hawaii Supreme Court's decision.[26]

With respect to the Hawaii Supreme Court's decision, we disagree with its reasoning that the "extrinsic" nature of the factual findings required for step two exempt them from *Apprendi's* reach.[27] *Apprendi* made irrelevant any distinction between facts based on their "intrinsic" or "elemental" quality for purposes of ascertaining whether the Sixth Amendment requires a jury to find them.[28]

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interpretation of the New York statute previously adopted, the Second Circuit held in *Brown* that the Court of Appeals of New York did not unreasonably apply *Apprendi* in upholding the persistent felony offender statute. *Id.* However, to the extent that the Court of Appeals of New York relied on the pre-*Apprendi* distinction between "elemental" facts and "sentencing factors" in its analysis of the statute, *see Rosen*, 728 N.Y.S.2d 407, 752 N.E.2d at 847, we disagree with the Second Circuit's conclusion that the New York court's decision was not contrary to, or an unreasonable application of, *Apprendi*. *See Brown*, 409 F.3d at 534.

[26] *Van Lynn*, 347 F.3d at 737.

[27] *Kaua*, 72 P.3d at 482; *see State v. Tafoya*, 91 Hawai'i 261, 982 P.2d 890, 900 (1999) ("'[I]ntrinsic' factors, required to be pled in the indictment and found by the jury, are . . . contemporaneous with, and enmeshed in, the statutory elements of the proscribed offense. Contrarily 'extrinsic' factors are separable from the offense itself in that they involve consideration of collateral events or information.").

[28] *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348 ("[I]t does not matter [how] the required finding is characterized . . . because labels do not afford an acceptable answer" to the constitutional question.) (internal quotation marks and brackets omitted).

Apprendi announced a new rule that focused on the *effect* of a court's finding of fact, not on the label the statute or the court applied to that fact.[29] The United States Supreme Court plainly set forth this new rule, stating that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[30] If so, the Sixth Amendment requires a jury, not a judge, to make the finding.[31] *Apprendi* exempted only one finding – the fact of a prior conviction – from this "general rule."[32]

The sentencing court's public protection finding, coupled with the finding of multiple felonies, exposed Kaua to a sentence greater than the jury's guilty verdict authorized. Although it was proper for the court to make the multiple felony finding, under *Apprendi,* a jury should have made the public protection finding. The Hawaii Supreme Court's opposite conclusion, therefore, was contrary to *Apprendi.*

CONCLUSION

The Hawaii Supreme Court's affirmance of Kaua's extended sentence was contrary to the U.S. Supreme Court's decision in *Apprendi.* The state court applied its

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[29] *Id.* at 492-94 & n. 19, 120 S.Ct. 2348 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the *functional equivalent of an element* of a greater offense than the one covered by the jury's guilty verdict.") (emphasis added).

[30] *Id.* at 494, 120 S.Ct. 2348.

[31] *Id.* at 490, 120 S.Ct. 2348.

[32] *Id.* at 490, 120 S.Ct. 2348.

"intrinsic-extrinsic" analysis, which is a variant of the "element-sentencing factor" distinction that *Apprendi* explicitly rejected. Because the effect of the public protection finding was to increase Kaua's sentence above that authorized by the jury's guilty verdict, the Sixth Amendment required a jury to make the finding. Therefore, the district court's grant of Kaua's petition for a writ of habeas corpus is AFFIRMED.

350 F.Supp.2d 848

United States District Court, D. Hawai'i.
Wayman KAUA, Petitioner,
v.
Clayton FRANK, Warden,
Halawa Correctional Center, Respondent.
Civ. No. 03-00432 SOM/BMK.

Dec. 9, 2004.

Peter Wolff, Jr., Federal Defender, Office of the Federal Public Defender, Honolulu, HI, Attorney for Petitioner.

Loren J. Thomas, Office of the Prosecuting Attorney, Honolulu, HI, Attorneys for Respondent.

ORDER GRANTING PETITIONER'S 28 U.S.C. § 2254 PETITION TO VACATE EXTENDED SENTENCE

MOLLWAY, District Judge.

I. *INTRODUCTION.*

Petitioner Wayman Kaua challenges an extended sentence imposed on him by a state judge pursuant to the state law in effect at the time he was sentenced. Following the imposition of his sentence, but before his judgment of conviction and sentence became final, the United States Supreme Court decided *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). After the Hawaii Supreme Court affirmed his judgment of conviction and sentence, Kaua moved to correct his sentence based on *Apprendi.* That motion was denied by the state trial court, and that denial was affirmed by the Hawaii Supreme Court.

This § 2254 petition presents the question of whether Kaua's extended sentence of incarceration violates *Apprendi*. This court concludes that Kaua's extended sentence clearly violates *Apprendi*, and that the extended sentence was based on an unreasonable application of *Apprendi*. This court therefore grants Kaua's § 2254 petition.

II. *BACKGROUND.*

The facts of this case are undisputed and have been set forth in *Hawaii v. Kaua*, 102 Hawai'i 1, 72 P.3d 473 (2003). On March 3, 1999, Kaua was indicted in a state court in connection with a hostage stand-off that had occurred when Honolulu Police Department officers attempted to execute a warrant for his arrest on October 29, 1999. Charges arising out of that hostage stand-off included: (1) attempted murder in the first degree, in violation of Haw.Rev.Stat. §§ 705-500 and 707-701(1)(a) (1993) (Count I); (2) attempted murder in the first degree, in violation of Haw.Rev.Stat. §§ 705-500 and 707-701(1)(b) (1993) (Counts II-IV); (3) kidnapping, in violation of Haw.Rev.Stat. § 707-720(1)(b) (1993) (Count V); (4) kidnapping, in violation of Haw.Rev.Stat. § 707-720(1)(e) (1993) (Count VI); (5) kidnapping, in violation of Haw.Rev.Stat. § 707-720(1)(f) (1993) (Count VII); (6) terroristic threatening in the first degree, in violation of Haw.Rev.Stat. § 707-716(1)(d) (1993) (Count VIII); (7) possession of any firearm or ammunition by a person convicted of certain crimes, in violation of Haw.Rev.Stat. §§ 134-7(b) and (h) (Supp.1999) (Count IX); (8) reckless endangering in the first degree, in violation of Haw.Rev.Stat. § 707-713 (1993) (Counts X-XII); and (9) carrying or use of a firearm in the commission of a separate felony, in violation of Haw.Rev.Stat. §§ 134-6(a)

and (e) (Supp.1999) (Count XIII). *See Kaua,* 102 Hawai'i at 2-3, 72 P.3d at 474-75.

After a trial, the state court jury returned a verdict on November 22, 1999, acquitting Kaua of the charge of attempted murder in the first degree (Count I), but finding him guilty of:

> (1) the lesser included offense of attempted assault in the first degree (Count II); (2) the lesser included offense of reckless endangering in the first degree (Count III); (3) the lesser included offense of attempted manslaughter based upon extreme mental or emotional disturbance (EMED) (Count IV); (4) kidnapping (Count V); (5) the lesser included offense of unlawful imprisonment in the second degree (Count VI); (6) kidnapping (Count VII); (7) terroristic threatening in the first degree (Count VIII); (8) possession of any firearm or ammunition by a person convicted of certain crimes (Count IX); (9) reckless endangering in the first degree (Counts X-XII); and (10) carrying or use of a firearm in the commission of a separate felony (Count XIII).

Kaua, 102 Hawai'i at 3, 72 P.3d at 475.

It is undisputed that the attempted manslaughter and one of the firearm-related offenses were class A felonies. Under Haw.Rev.Stat. § 706-659, a person who has been convicted of a class A felony "shall be sentenced to an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation."

It is also undisputed that the first-degree assault and another one of the firearm-related offenses were class B felonies. The first-degree terroristic threatening and the

four counts of reckless endangering offenses were class C felonies. Under Haw.Rev.Stat. § 706-660, those class B and C felony convictions subjected Kaua to indeterminate terms of imprisonment of ten and five years, respectively.

Rather than seeking a sentence in accordance with sections 706-659 and 706-660, the prosecution filed a motion for extended terms of imprisonment pursuant to Haw.Rev.Stat. § 706-662(4) (Supp.1999). At that time, section 706-662(4) provided:

> A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:
>
> . . . . .
>
> (4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:
>
> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or
>
> (b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed, or would equal or exceed forty years if the extended term imposed is for a class A felony.

Kaua, 102 Hawai'i at 4 n. 1, 72 P.3d at 476 n. 1 (quoting Haw.Rev.Stat. § 706-662(4) (Supp.1999)).

After a hearing, the sentencing judge granted the prosecution's motion for an extended sentence. *Kaua,* 102 Hawai'i at 4, 72 P.3d at 476. In 1993, Kaua had been sentenced to a ten-year term of imprisonment for the offenses of possession of a firearm and possession of ammunition by a person convicted of certain crimes. *Id.* at 4 n. 3, 72 P.3d at 476 n. 3. The court therefore found that Kaua qualified for an extended sentence as a multiple offender. *Id.* at 5, 72 P.3d at 477.

The sentencing judge then turned to what it viewed as "discretionary matters," including whether an extended term of imprisonment was necessary for the protection of the public. *Kaua,* 102 Hawai'i at 4-5, 72 P.3d at 476-77. Based on matters discussed at the February 1, 2000, hearing, the sentencing judge stated:

> Defendant's history suggests the following; from an early age, alcoholism, substance abuse. And the substance abuse is of great concern, because as a youth, it went from marijuana to cocaine, opiates, and then crystal methamphetamine. The use sometimes was sporadic. But when [Kaua] abused the drugs, it was very severe. And undoubtedly, in the days or weeks surrounding these offenses and perhaps shortly before these offenses, [Kaua] was abusing drugs in the court's judgment.
>
> Now, his history also suggests assaultive behavior, threatening behavior. We have abuse of household member, terroristic threatening, other incidents which have been reported or mentioned by the prosecution. Basically, it's the court's conclusion that while under the influence or while under extreme stress, [Kaua] is unable to control his behavior. And that impairment has brought

about assaultive behavior as well as threatening behavior.

Of more concern is . . . his access to firearms. Before these incidents, [Kaua] did have a firearm conviction. And reportedly on other occasions, he resorted to use of firearms, although in one incident, I understand that it's been disputed. And, of course, in the incidents before the court, [Kaua] used an assault rifle.

. . . . .

. . . . Certainly[,] he had the assistance of his spouse in identifying who these people were outside and [in] what capacity they were out there. It's not only the police officer who could have been shot, but it could have been other people. And I understand that there were children in the vicinity. He may not have intended to hit any children. But in the manner that the rifle was being fired, there's also a strong . . . possibility that minors could have been hurt as well as other innocent bystanders.

Basically, [Kaua], I believe when I look at the factors and consider his character, his history, his attitude, and the need for a structured environment, I believe that it's necessary for the protection of the public to impose the extended terms. . . .

Kaua, 102 Hawai'i at 5, 72 P.3d at 477.

The court then sentenced Kaua as follows:

(1) for the lesser included offense of attempted assault in the first degree (Count II), an extended indeterminate maximum twenty-year prison term, subject to mandatory minimum

terms of three years and four months as a repeat offender and ten years for the use of a semiautomatic firearm; (2) for the offense of reckless endangering in the first degree (Counts III, X, XI, and XII): extended indeterminate maximum ten-year prison terms as to each of Counts III, X, XI, and XII, subject to mandatory minimum terms of one year and eight months as a repeat offender and five years for the use of a semiautomatic firearm; (3) for the lesser included offense of attempted manslaughter based upon EMED (Count IV), an extended indeterminate maximum term of life imprisonment with the possibility of parole, subject to mandatory minimum terms of six years and eights months as a repeat offender and fifteen years for the use of a semiautomatic firearm; (4) for the offense of terroristic threatening in the first degree (Count VIII), an extended indeterminate maximum ten-year prison term, subject to mandatory minimum terms of one year and eight months as a repeat offender and five years for the use of a semiautomatic firearm; (5) for the offense of possession of any firearm or ammunition by a person convicted of certain crimes (Count IX), an extended indeterminate maximum twenty-year prison term, subject to a mandatory minimum term of three years and four months as a repeat offender; and (6) for the offense of carrying or use of a firearm in the commission of a separate offense (Count XIII), an extended indeterminate maximum term of life imprisonment with the possibility of parole, subject to a mandatory minimum term of six years and eight months as a repeat offender. The circuit court further ruled that the six terms were to run concurrently with each other but consecutively to the sentence in Cr. No. 90-1996.

Kaua, 102 Hawai'i at 5-6, 72 P.3d at 477-78. This sentence complied with governing Hawaii appellate decisions in effect at the time.

On February 28, 2000, Kaua filed a timely notice of appeal. On May 1, 2001, the Hawaii Supreme Court issued a summary disposition order that affirmed the trial court's judgment of conviction and sentence. *Kaua,* 102 Hawai'i at 6, 72 P.3d at 478.

On June 26, 2000, after Kaua had filed his direct appeal but before the Hawaii Supreme Court had issued its summary disposition of Kaua's direct appeal, the United States Supreme Court decided *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Because Kaua's direct appeal was still pending when *Apprendi* was decided, the new rule announced in *Apprendi* applied to Kaua's case on direct appeal. *See Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"); *United States v. Sanchez-Cervantes,* 282 F.3d 664, 665 (9th Cir.2002) (stating that "the new rule of criminal procedure announced in *Apprendi* does not apply retroactively on initial collateral review"); *Panoke v. United States,* 2001 WL 46941, *2 (D.Hawaii Jan 5, 2001) ("The decision in *Apprendi* definitively announced a new rule of constitutional law.").[1] Nevertheless, *Apprendi* issues appear not to

[1] Because *Apprendi's* new rule was announced before Kaua's state court judgment became final, the court is not faced with the issue of whether *Apprendi* applies to a collateral review of Kaua's judgment. *See Teague v. Lane,* 489 U.S. 288, 310-13, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

have been briefed to or expressly addressed by the Hawaii Supreme Court in Kaua's direct appeal of his sentence.

On March 13, 2002, pursuant to Rule 35 of the Hawaii Rules of Penal Procedure, Kaua filed a motion with the trial court ("Rule 35 court") for correction of his sentence based on *Apprendi*. The Rule 35 court denied that Rule 35 motion on May 6, 2002. In denying the motion, the Rule 35 court found that Kaua had stipulated to the fact that he was being sentenced for two or more felonies and had been under a sentence of imprisonment for another felony. The Rule 35 court also noted that the sentencing court had "made specific findings justifying the conclusion that an extended term of imprisonment was necessary for the protection of the public." These findings included Kaua's "history of substance abuse, his assaultive and threatening behavior, access to firearms, [Kaua's] inability to control his behavior under extreme stress, and the severe trauma [Kaua's] behavior caused the victim." *Kaua,* 102 Hawai'i at 6-7, 72 P.3d at 478-79.

On June 4, 2002, Kaua appealed the denial of his Rule 35 motion to correct illegal sentence. The Hawaii Supreme Court affirmed the Rule 35 court in a reported decision on July 8, 2003. *See Kaua,* 102 Hawai'i at 1, 72 P.3d at 473. In the interim, on June 24, 2002, the United States Supreme Court decided *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which applied what the Supreme Court had clearly explained in *Apprendi.*

III. *ANALYSIS.*

A. *Kaua Exhausted His State Court Remedies.*

Before filing the present petition, Kaua was required to exhaust his state court remedies. *See* 28 U.S.C.

§ 2254(b)(1)(A). This exhaustion requirement included *Apprendi* issues. While retroactive application of *Apprendi* to initial petitions for collateral review is barred, *see United States v. Sanchez-Cervantes,* 282 F.3d 664, 667 (9th Cir.2002), that bar does not apply here. That is because retroactive application of a law occurs only if the new law is applied to a matter in which a judgment was final before adoption of the new law. *See Caspari v. Bohlen,* 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994) (a judgment is not final for purposes of retroactivity analysis until direct appeals have been exhausted and the time for filing a certiorari petition has expired or, if a certiorari petition is filed, certiorari proceedings have concluded). Because Kaua's direct appeal had not been decided before *Apprendi* was decided, Kaua's sentence was not final when *Apprendi* was decided. Application of *Apprendi* to Kaua's case is therefore not a retroactive application. *See Griffith,* 479 U.S. at 328, 107 S.Ct. 708.

Although Kaua could have, but did not, raise *Apprendi* in the direct appeal of his sentence to the Hawaii Supreme Court, he did raise *Apprendi* in his Rule 35 motion and in the appeal of the denial of that motion. The Hawaii Supreme Court addressed the merits of Kaua's *Apprendi* claim in the appeal of the denial of his Rule 35 motion. It is unclear, however, on what ground the Hawaii Supreme Court reached the merits of Kaua's *Apprendi* claim. Either the Hawaii Supreme Court addressed the claim because *Apprendi* had been decided during the pendency of Kaua's direct appeal, meaning that its application was not a retroactive application on collateral review, or the Hawaii Supreme Court was relying on the provision in Rule 35 allowing a motion to correct an illegal sentence "at any time" and thereby

permitting an *Apprendi* issue that had not been argued on Kaua's direct appeal.[2]

The State argues in its supplemental brief that Kaua "should not be permitted to now raise" the *Apprendi* argument because he failed to raise it in his direct appeal.[3] That argument is unpersuasive. By the time the Hawaii Supreme Court addressed the *Apprendi* issue on July 8, 2003, Rules 35 and 40 of the Hawaii Rules of Penal Procedure had been amended. As amended, a Rule 35 motion brought more than 90 days after a sentence was imposed was governed by Rule 40 of the Hawaii Rules of Penal Procedure. The amended Rule 40(a)(3) clearly stated that a motion to correct an illegal sentence was not waived when a petitioner failed to raise the issue of the allegedly illegal sentence before the trial court or on appeal.[4]

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[2] Proper exhaustion of state court remedies occurred given the following circumstances: (a) Kaua could have raised Apprendi on direct review because *Apprendi* had been decided before Kaua's judgment of conviction and sentence became final; (2) the issue was raised and addressed for the first time in a Rule 35 motion and on appeal of the denial of that motion; and (3) the State has failed to articulate any exhaustion argument based on § 2254(b)(1)(A).

[3] This argument is related to but slightly different from an argument of complete failure to exhaust state court remedies under § 2254(b)(1)(A). The State is not arguing here that Kaua's appeal of the denial of his Rule 35 motion was insufficient to exhaust his state court remedies for purposes of § 2254(b)(1)(A). Instead, the State appears to be arguing in essence that, by failing to raise an issue on direct appeal, Kaua waived the right to raise that issue on a Rule 35 motion or under § 2254. No law supports this argument or any procedural default argument. *See Carter v. Giurbino*, 385 F.3d 1194, 1196-97 (9th Cir.2004).

[4] Before the amendments became effective on July 1, 2003, Rule 40(a)(3) provided that an issue was waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding

(Continued on following page)

Nor does § 2254 provide that Kaua waived any *Apprendi* argument. In *Reiger v. Christensen*, 789 F.2d 1425, 1427 (9th Cir.1986), the Ninth Circuit stated, "If the habeas petitioner's claim was not presented to the state court on direct appeal, state collateral remedies must be exhausted." *Accord Sweet v. Cupp*, 640 F.2d 233, 235-36 (9th Cir.1981). The Ninth Circuit thus implied that a claim not raised on direct appeal could be raised in a state collateral proceeding. This typically happens with, for example, ineffective assistance of counsel claims. Because Kaua exhausted his state collateral remedies, he cannot be said to have waived his *Apprendi* argument for purposes of his § 2254 petition.[5]

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actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue.

See Order Amending the Hawaii Rules of Penal Procedure (April 25, 2003); *Reiger v. Christensen*, 789 F.2d 1425, 1427 (9th Cir.1986) (noting that, under Rule 40(a)(3) of the Hawaii Rules of Penal Procedure before the amendment, the failure to raise an issue on direct appeal barred state collateral relief based on that issue). The Hawaii Supreme Court, which considered Kaua's *Apprendi* issue in his state collateral proceeding, appears to have applied the amended Rule 40(a)(3), which states that claims of illegal sentence are not waived by a failure to raise them on direct appeal.

[5] The State does not contend that § 2244(d)(1)'s one-year statute of limitation bars Kaua's petition, presumably because that limitation period was tolled during the pendency of Kaua's Rule 35 motion and appeal of the denial of that motion. This court is therefore not faced with the issue of whether a petition would be barred under § 2244(d)(1) if a Rule 35 motion were brought in state court more than a year after the judgment of conviction and sentence became final.

B. *The Hawaii Supreme Court's Decision was Contrary to, as well as an Unreasonable Application of, Clearly Established Federal Law, as Determined by the United States Supreme Court.*

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), Kaua requests relief from the extended sentence imposed on him. The AEDPA imposes a "highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy,* 521 U.S. 320, 334, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Clark v. Murphy,* 331 F.3d 1062, 1067 (9th Cir.), *cert. denied,* 540 U.S. 968, 124 S.Ct. 446, 157 L.Ed.2d 313 (2003). Under § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Kaua bases his petition on § 2254(d)(1).

For purposes of § 2254(d)(1), a state court decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court," when "the state court arrives at a conclusion opposite to that reached by [the

Supreme Court] on a question of law," or when "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." *Williams v. Taylor,* 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *accord Lockyer v. Andrade,* 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (" 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"); *Clark,* 331 F.3d at 1067 ("A decision is contrary to clearly established federal law if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result.").

A state court decision is "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" when "the state court identifies the correct governing legal rule from [Supreme Court] cases, but unreasonably applies it to the facts of the particular case," or when "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."[6] *Williams,* 529 U.S. at 407, 120 S.Ct. 1495; *see also Clark,* 331 F.3d at 1067. The "unreasonable application" clause "requires the state court

[6] "While circuit law may be 'persuasive authority' for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Clark,* 331 F.3d at 1069.

decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer,* 538 U.S. at 75, 123 S.Ct. 1166; *accord Himes v. Thompson,* 336 F.3d 848, 852-53 (9th Cir.2003); *Clark,* 331 F.3d at 1068.

Based on *Apprendi,* Kaua argues that the extended sentence he received was contrary to clearly established federal law, as determined by the Supreme Court of the United States, and that it was an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. This court agrees.

In *Apprendi,* the Supreme Court examined a New Jersey law that allowed a judge to enhance a sentence beyond the statutory maximum sentence for a crime when the judge found by a mere preponderance of the evidence that the crime was committed with the purpose of intimidating an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. *Apprendi,* 530 U.S. at 468-69, 120 S.Ct. 2348. The Supreme Court found that New Jersey law unconstitutional because it removed from the jury the assessment of facts that increased the prescribed range of penalties to which a criminal defendant was exposed. *Id.* at 490, 497, 120 S.Ct. 2348. The Supreme Court stated that such facts had to be established by proof beyond a reasonable doubt, noting that it "is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490, 120 S.Ct. 2348. Accordingly, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum

must be submitted to a jury, and proved beyond a reasonable doubt."[7] *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348.

The holding of *Apprendi* applies both to elements of a crime and sentencing factors. "[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348.

The Supreme Court limited its holding in *Apprendi* to cases in which the statutory range of punishment was exceeded. *See Apprendi,* 530 U.S. at 481, 120 S.Ct. 2348 ("nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment within the range prescribed by statute") and at 487 n. 13 ("We do not overrule *McMillan.* We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory

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[7] The Supreme Court exempted "prior convictions" from the *Apprendi* requirements, reasoning that, with respect to these previous convictions, defendants have already received the requisite procedural safeguards. *See Apprendi,* 530 U.S. at 488, 120 S.Ct. 2348. This reasoning was consistent with the Supreme Court's earlier decision in *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), in which the Court held that recidivism was a traditional basis for increasing an offender's sentence:

> [T]he court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was necessary to bring the case within the statute.

Almendarez-Torres, 523 U.S. at 243, 118 S.Ct. 1219.

maximum for the offense established by the jury's verdict.").[8]

Before the Supreme Court decided *Apprendi,* the Hawaii Supreme Court had examined Hawaii's extended sentence law, found at section 706-662 of the Hawaii Revised Statutes. *See State v. Schroeder,* 76 Hawai'i 517, 880 P.2d 192 (Haw.1994). The Hawaii Supreme Court had ruled that each of the subsections of section 706-662 required the trial court to conduct a two-step process. The first step required the trial court to determine whether a defendant was within the "class of offenders to which the particular subsection applies." *Id.* at 527, 880 P.2d at 202. If the trial court determined that a defendant was included in the "class of offenders," the trial court could determine whether the defendant's commitment was necessary for the protection of the public using the procedural standards "applicable to ordinary sentencing." *Id.* at 528, 880 P.2d at 203. The Hawaii Supreme Court later explained that, "[u]nder ordinary sentencing procedures, the court is afforded wide latitude in the selection of penalties from those prescribed and in the determination of their severity." *State v. Okumura,* 78 Hawai'i 383, 413, 894 P.2d 80, 110 (Haw.1995). So that the trial court's "protection of the public" determination could be meaningfully reviewed on appeal, trial courts were required to articulate findings of fact supporting that determination.

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[8] *McMillan v. Pennsylvania,* 477 U.S. 79, 81, 91, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), upheld a Pennsylvania statute that subjected a person convicted of certain enumerated felonies to a mandatory minimum sentence of five years if the sentencing judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense.

Id. The judge who sentenced Kaua did exactly what was required by *Schroeder* and *Okumura.*

In *State v. Carvalho,* 101 Hawai'i 97, 63 P.3d 405 (Haw.App.2002), a post-*Apprendi* case, the Intermediate Court of Appeals for the State of Hawaii ("ICA") sought to reconcile the Hawaii Supreme Court's pre-*Apprendi* decision in *Schroeder* with *Apprendi.* The ICA reviewed the application of section 706-662(4), the very subsection at issue in this case. Relying on that statute, the sentencing judge had imposed an extended sentence. The ICA recognized that a sentencing judge's first inquiry in considering an extended sentence relates to the defendant's prior felony convictions. *Apprendi* does not require prior convictions to be found by a jury to support imposition of a penalty beyond that otherwise prescribed by statute. The ICA concluded that it was just such a finding of prior felony convictions that had exposed the defendant in *Carvalho* to the extended term sentence. Put another way, the ICA ruled that the finding of the defendant's prior felony convictions established the statutory range for the defendant's sentence – an enhanced range. *Carvalho,* 101 Hawai'i at 111, 63 P.3d at 419.

The ICA then ruled that the sentencing court's further determination that a defendant's incarceration was necessary for the protection of the public was merely an exercise of the court's discretion to impose a sentence within the extended range. The ICA therefore held that *Apprendi* was not applicable to the determination of whether the defendant's incarceration was necessary for the protection of the public because that fact did not increase the penalty for a crime beyond the prescribed statutory maximum. *Id.*

This court is compelled to conclude that, in *Carvalho,* the ICA took a wrong turn. The *Apprendi* issue presented in *Carvalho* was one of first impression for Hawaii's appellate courts, but it had been addressed by the appellate courts of other jurisdictions. The ICA relied heavily on the decision by the Court of Appeals of New York in *People v. Rosen,* 96 N.Y.2d 329, 728 N.Y.S.2d 407, 752 N.E.2d 844, *cert. denied,* 534 U.S. 899, 122 S.Ct. 224, 151 L.Ed.2d 160 (2001). *Rosen* addressed a New York statute very much like the extended sentence statute in issue in *Carvalho.* New York's Court of Appeals held that it was the defendant's prior felony convictions alone that exposed the defendant to an extended sentence, notwithstanding the statutory requirement that the sentencing court also review the defendant's history and character and the nature and circumstances of the crime in deciding whether to impose an extended term. The *Rosen* decision characterized the inquiry into the defendant's history and character and the nature and circumstances of the crime as the fulfillment by the sentencing court of its traditional role of determining the appropriate sentence within the statutory range, which was already extended in light of the prior convictions. The New York court then concluded that the extended sentence presented no *Apprendi* violation.

This court agrees with the ICA that *Carvalho* presented a situation that, for *Apprendi* purposes, was indistinguishable from *Rosen.* But in relying on the Court of Appeals of New York, Hawaii's ICA was relying on a case that clearly contravenes the dictates of *Apprendi.*[9] The ICA

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[9] Thus, in *Brown v. Greiner,* 258 F.Supp.2d 68 (E.D.N.Y.2003), a habeas petition similar to the one Kaua brings here, a federal court in New York noted that *Rosen* was wrongly decided. That federal court

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was mistakenly diverted by *Rosen* from applying *Apprendi.*

The Hawaii Supreme Court initially granted a writ of certiorari to review the ICA's decision in *Carvalho, see State v. Carvalho,* 100 Hawai'i 295, 59 P.3d 930 (2002), but the writ was later dismissed, *see State v. Carvalho,* 101 Hawai'i 233, 65 P.3d 180 (2003). When Kaua appealed from the denial of his Rule 35 motion, the Hawaii Supreme Court, having earlier affirmed Kaua's sentence on direct appeal, decided to keep Kaua's Rule 35 appeal itself rather than exercise its discretion to refer it to the ICA. *See* Haw. R.App. P. 31. Not discerning the error in *Carvalho,* the Hawaii Supreme Court then applied *Carvalho* in determining that Kaua's extended sentence did not violate *Apprendi. See Kaua,* 102 Hawai'i at 12-13, 72 P.3d at 484-85.

The Hawaii Supreme Court explained that the finding that Kaua was a multiple offender fell outside the scope of *Apprendi,* like any finding based solely on a prior conviction. *See id.* at 13, 72 P.3d at 485. That multiple offender status was undisputed, as Kaua himself stipulated to his prior record. *Id.* at 13, 72 P.3d at 485. Applying *Carvalho,* the Hawaii Supreme Court reasoned that it was only Kaua's multiple offender status that had exposed him to the extended sentence range. According to the Hawaii Supreme Court, the sentencing court's determination that Kaua's incarceration was necessary for the protection of

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stated, "I have no difficulty concluding that *Rosen's* conclusion is opposite to that reached by the Supreme Court in *Apprendi* on a question of law." *Id.* at 90.

the public was a mere offshoot of the finding that Kaua was a multiple offender.

The Hawaii Supreme Court noted that the facts establishing the need to protect the public were not "intrinsic" to the crimes charged; that is, they were not "contemporaneous with, and enmeshed in, the statutory elements of the proscribed offense." *Id.* at 11, 72 P.3d at 483 (quoting *State v. Tafoya,* 91 Hawai'i 261, 271, 982 P.2d 890, 900 (1999)). In contrast to "intrinsic" facts, "extrinsic" facts such as those establishing a need to protect the public need not, according to the Hawaii Supreme Court, be alleged in the indictment and determined by the trier of fact. *Id.* at 10, 72 P.3d at 482. Thus, the court upheld the sentencing judge's determination of "extrinsic" facts and the resulting extended sentence.

In considering whether the *Kaua* decision contravenes *Apprendi,* this court confines itself to examining the grounds on which the Hawaii Supreme Court held that Kaua's sentence survived *Apprendi.* This court may not, on this § 2254 petition, justify the Hawaii Supreme Court's ruling on the basis of alternative grounds that the Hawaii Supreme Court could have, but did not, articulate. *See Van Lynn v. Farmon,* 347 F.3d 735, 737 (9th Cir.2003).

The *Kaua* decision's reading of *Apprendi* flies in the face of the actual language of *Apprendi,* especially as that language has been construed in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This court recognizes that, while *Ring* was decided before the Hawaii Supreme Court ruled on Kaua's Rule 35 appeal, *Ring* had not yet been decided when the Hawaii Supreme Court ruled on Kaua's direct appeal from his sentence. This means that Kaua's sentence could not be vacated via a

habeas petition based on *Ring* alone. *See Schriro v. Summerlin*, ___ U.S. ___, ___, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."); *Teague*, 489 U.S. at 310-13, 109 S.Ct. 1060. However, nothing prevented the Hawaii Supreme Court from citing *Ring* or any other source as illustrating the principles clearly set forth in *Apprendi*, which had been decided before Kaua's direct appeal from his sentence was concluded. Indeed, in recognition of the availability of *Ring*, the Hawaii Supreme Court itself mentioned *Ring* in deciding Kaua's Rule 35 appeal, although it unfortunately confined its discussion of *Ring* to a passing reference. *See Kaua*, 102 Hawai'i at 12 n. 9, 72 P.3d at 484 n. 9. While this court bases its decision on the clear statements in *Apprendi*, this court notes that *Ring* provides an excellent illustration of the express holding in *Apprendi*.

In *Ring*, the United States Supreme Court examined an Arizona statute that provided for life imprisonment or death for those convicted of first-degree murder. The death penalty, however, was available only if the sentencing court made further findings as to the presence or absence of certain aggravating and mitigating circumstances. *See Ring*, 536 U.S. at 592-93, 122 S.Ct. 2428.

Ring was convicted of first-degree murder in connection with the robbery of a Wells Fargo armored van in which a guard was killed and money was taken from the van. The Supreme Court explained that, under Arizona law, Ring was eligible for the death penalty only if he was either the actual killer or a major participant in the armed robbery that led to the killing who had exhibited a reckless disregard for or indifference to human life. *Id.* at 592, 122 S.Ct. 2428. The evidence at trial did not establish that

Ring was the actual killer or that he was a major participant in the robbery/murder. Between Ring's trial and his sentencing proceeding, a co-defendant pled guilty and agreed to cooperate with the prosecution. This co-defendant testified at Ring's sentencing hearing that Ring had planned the robbery and that Ring had shot and killed the guard. *Id.* at 593, 122 S.Ct. 2428. Based on the testimony of the co-defendant at Ring's sentencing hearing, as opposed to the trial evidence presented to the jury, the sentencing judge imposed the death penalty. *Id.* at 594, 122 S.Ct. 2428.

On appeal, Ring argued that his sentence violated *Apprendi*. *Apprendi* held that "the relevant inquiry is one not of form, but of effect." *Id.* at 604, 122 S.Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348). *Apprendi* counseled courts to determine whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348. The Supreme Court held that, based solely on the jury verdict, the maximum penalty Ring could have received was life in prison, not death. *Ring,* 536 U.S. at 597, 122 S.Ct. 2428. It noted that, in effect, "the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Ring,* 536 U.S. at 604, 122 S.Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348) (internal punctuation changes omitted). The Court concluded that Arizona's death penalty statute therefore violated *Apprendi;* the required aggravating circumstances found by the judge operated as "the functional equivalent of an element of a greater offense." *Ring,* 536 U.S. at 609, 122 S.Ct. 2428.

In *Ring,* Arizona argued that Ring's murder conviction was what exposed Ring to a sentence of either life in prison or death. Arizona contended that the judge had merely selected a sentence within the range of life imprisonment to death, based on aggravating factors. The Supreme Court rejected this contention, concluding that it was the aggravating circumstances that had exposed Ring to the death penalty. Because the aggravating circumstances were not determined by a jury, the Supreme Court concluded that Arizona's statute violated *Apprendi. See Ring,* 536 U.S. at 603-04, 122 S.Ct. 2428.

Ring flowed inexorably from *Apprendi.* Like Ring's extended sentence, Kaua's extended sentence violated *Apprendi.*

The Hawaii Supreme Court's conclusion that Kaua's extended sentence did not violate *Apprendi* was contrary to, and involved an unreasonable application of, clearly established federal law, as determined by the United State[s] Supreme Court. This law was clearly established even before *Ring* so pointedly applied *Apprendi.* The *Kaua* decision simply ignored the language in *Apprendi* stating:

> [W]hen the term "sentencing enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Apprendi, 530 U.S. at 494 n. 19, 120 S.Ct. 2348.

Apprendi noted that "the relevant inquiry is one not of form, but of effect." *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348. *Accord Ring,* 536 U.S at 604, 122 S.Ct. 2428. The

Hawaii Supreme Court ignored the effect of the "protection of the public" determination on Kaua's sentence. Both in the hearing before this court and in its papers, the State of Hawaii admitted that the sentencing judge had to make that "protection of the public" determination before imposing the extended sentence. *See* Opposition Memorandum at 30. What the State does not admit and what the Hawaii Supreme Court failed to recognize was that the effect of that determination was to remove the functional equivalent of an element from the jury's province. Like the aggravating circumstances in *Ring,* which applied what was clearly articulated in *Apprendi,* these judge-made findings of fact exposed Kaua to a greater punishment than that authorized by the jury's guilty verdict. *See Ring,* 536 U.S. at 604, 122 S.Ct. 2428. The constitutional flaw in this procedure is not cured by designating a finding as being based on "extrinsic" facts. *Apprendi* applies equally to elements of an offense and to sentencing factors. *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348.

This case involves a statute that exposed Kaua to an enhanced punishment based on judge-determined facts. The sentencing judge made the "protection of the public" determination only after finding (1) that Kaua had a history of substance abuse and assaultive and threatening behavior, (2) that, when Kaua was under the influence of extreme stress, Kaua was unable to control his behavior, and (3) that Kaua had access to firearms and used those firearms in a manner that could have hurt minors or other innocent bystanders. These facts were not determined by a jury and were not restricted to Kaua's recidivism. His extended sentence, which was based on these findings, violated *Apprendi* and represented "a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

C. *Blakely is not Retroactive.*

Kaua argues that his extended sentence also violates the United States Supreme Court's June 2004 decision in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). *Blakely* was not decided until Kaua had exhausted his state court remedies and had already filed the present case under § 2254. Given the timing of *Blakely*, it may not serve as a basis for a collateral challenge to a state court judgment of conviction or a sentence. *See Cook v. United States*, 386 F.3d 949, 949 (9th Cir.2004) (holding that *Blakely* does not apply retroactively via an analogous petition under 28 U.S.C. § 2255).

IV. *CONCLUSION.*

Kaua's § 2254 petition is GRANTED, as Kaua's extended sentence was contrary to, and involved an unreasonable application of *Apprendi*.

This court denies the State of Hawaii's request for a stay of this order. The State of Hawaii is ordered to resentence Kaua in a manner consistent with this order.

The Clerk of this Court is directed to enter judgment in Kaua's favor and to close this case.

IT IS SO ORDERED.

72 P.3d 473

Supreme Court of Hawai'i.
STATE of Hawai'i, Plaintiff-Appellee,
v.
Wayman KAUA, Defendant-Appellee.
No. 25147.

July 8, 2003.

Joyce K. Matsumori-Hoshijo, Deputy Public Defender, on the briefs, for the defendant-appellant Wayman Kaua.

Loren J. Thomas, Deputy Prosecuting Attorney, on the briefs, for the plaintiff-appellee State of Hawai'i.

MOON, C.J., LEVINSON, NAKAYAMA, AND ACOBA, JJ., and Intermediate Court of Appeals Judge LIM, Assigned by Reason of Vacancy.

Opinion of the court by LEVINSON, J.

The defendant-appellant Wayman Kaua appeals from the findings of fact (FOFs), conclusions of law (COLs), and order of the first circuit court, the Honorable Gail C. Nakatani presiding, filed on May 6, 2002, denying Kaua's motion for correction of illegal sentence. On appeal, Kaua's sole point of error is that the circuit court erred in denying his motion for correction of illegal sentence, based on the United States Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

As we discuss more fully *infra* in Section III, we believe that Kaua's argument is without merit. Accordingly, we affirm the circuit court's FOFs, COLs, and order denying Kaua's motion for correction of illegal sentence, filed on May 6, 2002.

I. *BACKGROUND*

The present matter arose out of an incident that occurred on October 29, 1999, involving a hostage stand-off between Kaua and several Honolulu Police Department (HPD) officers during the execution of a warrant for Kaua's arrest. On March 3, 1999, an O'ahu Grand Jury indicted Kaua, charging him with the following offenses: (1) attempted murder in the first degree, in violation of Hawai'i Revised Statutes (HRS) §§ 705-500 (1993) and 707-701(1)(a) (1993) (Count I); (2) attempted murder in the first degree, in violation of HRS §§ 705-500 and 707-701(1)(b) (1993) (Counts II-IV); (3) kidnapping, in violation of HRS § 707-720(1)(b) (1993) (Count V); (4) kidnapping, in violation of HRS § 707-720(1)(e) (1993) (Count VI); (5) kidnapping, in violation of HRS § 707-720(1)(f) (1993) (Count VII); (6) terroristic threatening in the first degree, in violation of HRS § 707-716(1)(d) (1993) (Count VIII); (7) possession of any firearm or ammunition by a person convicted of certain crimes, in violation of HRS § 134-7(b) and (h) (Supp.1999) (Count IX); (8) reckless endangering in the first degree, in violation of HRS § 707-713 (1993) (Counts X-XII); and (9) carrying or use of firearm in the commission of a separate felony, in violation of HRS § 134-6(a) and (e) (Supp.1999) (Count XIII).

Kaua's jury trial commenced on November 4, 1999 before the Honorable Wendell K. Huddy. On November 22, 1999, the jury acquitted Kaua of the offense of attempted murder in the first degree (Count I). The jury, however, returned the following guilty verdicts as to: (1) the lesser included offense of attempted assault in the first degree (Count II); (2) the lesser included offense of reckless endangering in the first degree (Count III); (3) the lesser included offense of attempted manslaughter based upon

extreme mental or emotional disturbance (EMED) (Count IV); (4) kidnapping (Count V); (5) the lesser included offense of unlawful imprisonment in the second degree (Count VI); (6) kidnapping (Count VII); (7) terroristic threatening in the first degree (Count VIII); (8) possession of any firearm or ammunition by a person convicted of certain crimes (Count IX); (9) reckless endangering in the first degree (Counts X-XII); and (10) carrying or use of a firearm in the commission of a separate felony (Count XIII).

With respect to Counts V-VII, the jury found that Kaua voluntarily released the hostage taken during the subject incident in a safe place prior to trial, thereby reducing the offense of kidnapping from a class A felony to a class B felony, pursuant to HRS § 707-720(3) (1993). With respect to Counts V-VIII and X-XII, the jury found that Kaua possessed and used or threatened to use a semiautomatic firearm during the commission of the offense of kidnapping. Finally, the circuit court merged Counts V and VII (kidnapping) and Count VI (unlawful imprisonment in the second degree) with Count XIII (carrying or use of a firearm in the commission of a separate felony).

On January 12, 2000, the prosecution filed a motion for extended terms of imprisonment, pursuant to HRS § 706-662(4)(a) (Supp.1999),[1] on the basis that Kaua was a

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[1] HRS § 706-662 provides in relevant part:

Criteria for extended terms of imprisonment. A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:

(Continued on following page)

(1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.

. . . .

(3) The defendant is a dangerous person whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. . . .

(4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:

(a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or

(b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively would equal or exceed in length the maximum of the extended term imposed, or would equal or exceed forty years if the extended term imposed is for a class A felony.

(5) The defendant is an offender against the elderly, handicapped, or a minor under the age of eight, whose imprisonment for an extended term is necessary for the protection of the public. . . .

We need not, and do not, address whether the assessment of a defendant's status as a "professional criminal," interposed by HRS § 706-662(2) (Supp.1999) as a prerequisite to the imposition of an extended term of imprisonment, falls within the purview of the United States Supreme Court's decision in *Apprendi*.

We do note, however, that, in 2001, the legislature amended HRS § 706-662 by adding subsection (6), which provides in relevant part:

(Continued on following page)

"multiple offender" and that his criminality was so extensive that extended terms of imprisonment were necessary for the protection of the public.[2] On February 1, 2000, the circuit court conducted a hearing on the prosecution's motion for extended terms of imprisonment, at which Kaua stipulated to, and the circuit court took judicial notice of, (1) his prior conviction in Cr. No. 90-1996[3] and (2) the offenses in Counts II-XIII of which he was convicted in the present matter. At the hearing, the prosecuting attorney (PA) argued that Kaua's extensive criminal

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(6) The defendant is a hate crime offender whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:

(a) The defendant is convicted of a crime under chapter 707, 708, or 711; and

(b) The defendant intentionally selected a victim, or in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, or sexual orientation of any person. *See* 2001 Haw. Sess. L. Act 240, § 3 at 631. We discuss the applicability of *Apprendi* to HRS §§ 706-662(1) and (3) through (6) *infra* in section III.

[2] In addition to the motion for extended terms of imprisonment, the prosecution filed a motion for mandatory minimum terms of imprisonment, pursuant to HRS § 706-660.1 (1993), *see infra* note 7, a motion for sentencing as a repeat offender, pursuant to HRS § 706-606.5 (1993), and a motion for consecutive term sentencing, pursuant to HRS §§ 706-668.5 (1993) and 706-606 (1993). On February 17, 2000, the circuit court granted in part and denied in part the prosecution's motion for consecutive term sentencing. That same day, the circuit court also granted the prosecution's motions for mandatory minimum terms of imprisonment and sentencing as a repeat offender.

[3] On March 30, 1993, the circuit court sentenced Kaua in Cr. No. 90-1996 to a ten-year term of imprisonment for the offenses of possession of a firearm by a person convicted of certain crimes, in violation of HRS § 134-7(b) (1993), and possession of ammunition by a person convicted of certain crimes, in violation of HRS §§ 134-7(b) and (g) (1993).

history, which extended from his childhood to adulthood, violent characteristics, life-threatening use of firearms, and history of substance abuse warranted extended terms of imprisonment with respect to Counts II-IV and VIII-XIII. Moreover, the PA emphasized that, to date, probation, parole, and rehabilitative treatment facilities had proven unsuccessful in deterring Kaua's criminal behavior and, therefore, urged the circuit court, within its discretion, to sentence Kaua to a term of life imprisonment with the possibility of parole. Defense counsel responded that no victim of Kaua's past crimes had sustained any physical injury from his criminal acts and that, although "his history and circumstances are not consistent with being a law-abiding citizen," Kaua's criminal record did not reflect "the multiplicity and the length" typical of convicted felons who had been sentenced to extended terms of imprisonment. Consequently, defense counsel requested that the circuit court sentence Kaua to a twenty-year indeterminate maximum term of imprisonment, subject to a fifteen-year mandatory minimum term. The PA retorted that the evidence adduced at Kaua's jury trial – namely, the fact that he took a woman hostage and fired several gunshots at HPD officers in an effort to avert the officers' attempt to execute a warrant for his arrest – substantially belied defense counsel's suggestion that "[Kaua] did not ever hurt anyone." Finally, the PA posited that imposing a twenty-year term of imprisonment in the present matter would, in effect, be sentencing Kaua as a " first-time offender."

> [PA]: If a person walked into a convenience store, pointed a semiautomatic gun at that person and said[,] ["]I want your money,["] and walks out of there, that person would get a 20-year term, 15 years without possibility of parole, not somebody

> who has distinguished themselves with three felony convictions, including two hostage-takings, [which is] probably a first in the state of Hawai'i.

In light of the foregoing arguments, the circuit court granted the prosecution's motion for extended terms of imprisonment, remarking as follows:

> On the Motion for Sentencing to Extended Terms of Imprisonment, as far as the first prong is concerned, that is, whether or not [Kaua] qualifies, again, [Kaua] has conceded. He is a multiple offender, and he was represented by legal counsel. All of those facts have been proven by the prosecution beyond a reasonable doubt.
>
> On the discretionary matters, first, on the motion for Extended Term of Imprisonment, discretionary is [whether] such term [is] necessary for the protection of the public.
>
> . . . .
>
> Defendant's history suggests the following; from an early age, alcoholism, substance abuse. And the substance abuse is of great concern, because as a youth, it went from marijuana to cocaine, opiates, and then crystal methamphetamine. The use sometimes was sporadic. But when [Kaua] abused the drugs, it was very severe. And undoubtedly, in the days or weeks surrounding these offenses and perhaps shortly before these offenses, [Kaua] was abusing drugs in the court's judgment.
>
> Now, his history also suggests assaultive behavior, threatening behavior. We have abuse of household member, terroristic threatening, other incidents which have been reported or mentioned by the prosecution. Basically, it's the court's conclusion

that while under the influence or while under extreme stress, [Kaua] is unable to control his behavior. And that impairment has brought about assaultive behavior as well as threatening behavior.

Of more concern is . . . his access to firearms. Before these incidents, [Kaua] did have a firearm conviction. And reportedly on other occasions, he resorted to use of firearms, although in one incident, I understand that it's been disputed. And, of course, in the incidents before the court, [Kaua] used an assault rifle.

. . . .

Now, as I recited this history, I can only reach a conclusion that in balancing all of these factors and in rendering this sentence, I'm considering the interest of the community, and I'm also considering the interest of the individual. For [Kaua], I do want to give him some hope. For his family, I want to give them some hope. For the community, I also want to give some protection, because basically it does come down to the individual.

And I don't agree with the defense that it was only [Kaua] who was hurt in this incident.[4] He used a rifle at a long range, and I do not believe that [Kaua] was experienced with use of that assault rifle. Shooting at a long range with people in the vicinity, without any kind of experience – and certainly he didn't show any kind of experience;

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[4] During the course of the hostage stand-off with HPD officers in the present matter, Kaua sustained a bullet wound to his head, leaving him blind in his right eye and deaf in his left ear.

> otherwise, he would have hit that police officer who was hiding behind his vehicle – other people could have been hurt by wild shots. And these were shots in the direction of a police officer, and I . . . think that [Kaua] knew that it was a police officer who was there. Certainly[,] he had the assistance of his spouse in identifying who these people were outside and [in] what capacity they were out there. It's not only the police officer who could have been shot, but it could have been other people. And I understand that there were children in the vicinity. He may not have intended to hit any children. But in the manner that the rifle was being fired, there's also a strong . . . possibility that minors could have been hurt as well as other innocent bystanders.
>
> Basically, [Kaua], I believe when I look at the factors and consider his character, his history, his attitude, and the need for a structured environment, I believe that it's necessary for the protection of the public to impose the extended terms. . . .

The circuit court subsequently sentenced Kaua as follows: (1) for the lesser included offense of attempted assault in the first degree (Count II), an extended indeterminate maximum twenty-year prison term, subject to mandatory minimum terms of three years and four months as a repeat offender and ten years for the use of a semiautomatic firearm; (2) for the offense of reckless endangering in the first degree (Counts III, X, XI, and XII), extended indeterminate maximum ten-year prison terms as to each of Counts III, X, XI, and XII, subject to mandatory minimum terms of one year and eight months as a repeat offender and five years for the use of a semiautomatic firearm; (3) for the lesser included offense of

attempted manslaughter based upon EMED (Count IV), an extended indeterminate maximum term of life imprisonment with the possibility of parole, subject to mandatory minimum terms of six years and eights months as a repeat offender and fifteen years for the use of a semiautomatic firearm; (4) for the offense of terroristic threatening in the first degree (Count VIII), an extended indeterminate maximum ten-year prison term, subject to mandatory minimum terms of one year and eight months as a repeat offender and five years for the use of a semiautomatic firearm; (5) for the offense of possession of any firearm or ammunition by a person convicted of certain crimes (Count IX), an extended indeterminate maximum twenty-year prison term, subject to a mandatory minimum term of three years and four months as a repeat offender; and (6) for the offense of carrying or use of a firearm in the commission of a separate offense (Count XIII), an extended indeterminate maximum term of life imprisonment with the possibility of parole, subject to a mandatory minimum term of six years and eight months as a repeat offender. The circuit court further ruled that the six terms were to run concurrently with each other but consecutively to the sentence in Cr. No. 90-1996.

On February 28, 2000, Kaua filed a timely notice of appeal.[5] On May 1, 2001, this court issued a summary

[5] On March 31, 2000, Kaua filed a motion for reconsideration of sentence and/or clarification of presentence detention credit. The circuit court granted Kaua's motion for clarification of presentence detention credit; although the record does not contain an order denying Kaua's motion for reconsideration, both parties' briefs on appeal represent that the circuit court denied Kaua's motion for reconsideration after a hearing on April 18, 2000, the transcripts of which have not been included in the record.

disposition order, affirming the circuit court's judgment of conviction and sentence.

On March 13, 2002, Kaua filed a motion for correction of illegal sentence [hereinafter, "Rule 35 motion"], pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35 (2001).[6] On March 20, 2002, the circuit court conducted a hearing on Kaua's Rule 35 motion, during which Kaua argued, *inter alia,* that, pursuant to the United States Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the two-step process for determining a criminal defendant's status as a "multiple offender," requisite to the imposition of an extended term of imprisonment pursuant to HRS § 706-662(4)(a), *see supra* note 1, is to be determined by the jury in a separate sentencing hearing. Kaua posited that the bright-line rule adopted by the *Apprendi* Court – *i.e.,* that any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt – essentially superceded this court's "intrinsic-extrinsic" analysis, first articulated in *State v. Schroeder,* 76 Hawai'i 517, 880 P.2d 192 (1994), and reaffirmed in *State v. Tafoya,* 91 Hawai'i 261, 982 P.2d 890 (1999), for purposes of determining whether the imposition of an extended term sentence was an issue for the sentencing court or the jury. The deputy prosecuting attorney

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[6] HRPP Rule 35 provides:

> **Correction or reduction of sentence.** The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. . . . The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

(DPA) countered that, in *Tafoya,* this court expressly stated that the two-step process for imposing an extended term of imprisonment under HRS § 706-662(4) was to be determined by the sentencing court and not the jury.

On May 6, 2002, the circuit court issued its FOFs, COLs, and order denying Kaua's Rule 35 motion, wherein the circuit court set forth the following relevant FOFs and COLs:

> [FOF No. 4:] At the sentencing hearing, [Kaua] stipulated to the underlying fact that he was being sentenced for two or more felonies and was under a sentence of imprisonment for another felony in Cr. No. 90-1996[,] thereby satisfying the requirements of [HRS §] 706-662(4)(a).
>
> [FOF No. 5:] Based on this stipulation[,] the court concluded that [Kaua] was a multiple offender within the meaning of the statute.
>
> [FOF No. 6:] The sentencing court also made specific findings justifying the conclusion that an extended term of imprisonment was necessary for the protection of the public.
>
> [FOF No. 7:] These findings included [Kaua's] history of substance abuse, his assaultive and threatening behavior, access to firearms, [Kaua's] inability to control his behavior under extreme stress, and the severe trauma [Kaua's] behavior caused the victim.
>
> [COL No. 1:] [Kaua] challenges the extended term of imprisonment pursuant to [HRS §] 706-662. [Kaua] argues that[,] pursuant to *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), his Fifth and Sixth Amendment rights were violated in that the initial complaint did not

make reference to the possibility of an extended sentence and that the sentence enhancement should have been presented to a trier of fact to determine.

[COL No. 2:] Based on the [FOFs] hereinabove, this Court concludes that the imposition of the extended term of imprisonment was properly proven and imposed in this case, and moreover falls within the "prior conviction" exception cited in *Apprendi.* The condition precedent to the application of the extended term of imprisonment was a prior conviction either in the same case or in another case.

[COL No. 3:] The facts of conviction which exposed [Kaua] to an extended term of imprisonment were not in the nature of "elements" of the offenses charged or of a separate legal offense.

[COL No. 4:] The facts of this case are akin to *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) which was upheld in *Apprendi.*

[COL No. 5:] The Hawai'i Supreme Court[,] in *State v. Tafoya,* 91 Hawai'i 261, 982 P.2d 890 (1999), stated in a footnote that the factors listed in section 706-662(2)-(4) were not facts susceptible of jury determination.

On June 04, 2002, Kaua filed a timely notice of appeal in the present matter.

II. *STANDARDS OF REVIEW*

A. *Questions Of Constitutional Law*

"We answer questions of constitutional law 'by exercising our own independent judgment based on the facts of

the case,'" and, thus, questions of constitutional law are reviewed on appeal "under the 'right/wrong' standard."

State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (citations omitted).

State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001).

B. *Sentencing*

[A] sentencing judge generally has broad discretion in imposing a sentence. *State v. Gaylord,* 78 Hawai'i 127, 143-44, 890 P.2d 1167, 1183-84 (1995); *State v. Valera,* 74 Haw. 424, 435, 848 P.2d 376, 381 (1993). The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. *Gaylord,* 78 Hawai'i at 144, 890 P.2d at 1184; *State v. Kumukau,* 71 Haw. 218, 227-28, 787 P.2d 682, 687-88 (1990); *State v. Murray*[,] 63 Haw. 12, 25, 621 P.2d 334, 342-43 (1980); *State v. Fry,* 61 Haw. 226, 231, 602 P.2d 13, 16 (1979).

> *Keawe v. State,* 79 Hawai'i 281, 284, 901 P.2d 481, 484 (1995). "[F]actors which indicate a plain and manifest abuse of discretion are arbitrary or capricious action by the judge and a rigid refusal to consider the defendant's contentions." *Fry,* 61 Haw. at 231, 602 P.2d at 17. And, "'[g]enerally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" *Keawe,* 79 Hawai'i at 284, 901 P.2d at 484 (quoting *Gaylord,* 78 Hawai'i at 144, 890 P.2d at 1184 (quoting *Kumukau,* 71 Haw. at 227-28, 787 P.2d at 688)).

State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000) (brackets and ellipsis points in original).

C. *Statutory Interpretation*

"[T]he interpretation of a statute . . . is a question of law reviewable de novo." *State v. Arceo,* 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (*quoting State v. Camara,* 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (citations omitted)). *See also State v. Toyomura,* 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995); *State v. Higa,* 79 Hawai'i 1, 3, 897 P.2d 928, 930 (1995); *State v. Nakata,* 76 Hawai'i 360, 365, 878 P.2d 699, 704 (1994). . . .

> *Gray v. Administrative Director of the Court,* 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997) (some brackets added and some in original). *See also State v. Soto,* 84 Hawai'i 229, 236, 933 P.2d 66, 73 (1997). Furthermore, our statutory construction is guided by established rules:
>
> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
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> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
>
> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning."

> HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.
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> *Gray,* 84 Hawai'i at 148, 931 P.2d at 590 (*quoting State v. Toyomura,* 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2)(1993). "Laws *in pari materia,* or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

Rauch, 94 Hawai'i at 322-23, 13 P.3d at 331-32 (quoting *State v. Kotis,* 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999) (quoting *State v. Dudoit,* 90 Hawai'i 262, 266, 978 P.2d 700, 704 (1999) (quoting *State v. Stocker,* 90 Hawai'i 85, 90-91, 976 P.2d 399, 404-05 (1999) (quoting *Ho v. Leftwhich,* 88 Hawai'i 251, 256-57, 965 P.2d 793, 798-99 (1998) (quoting *Korean Buddhist Dae Won Sa Temple v. Sullivan,* 87 Hawai'i 217, 229-30, 953 P.2d 1315, 1327-28 (1998)))))).

III. *THE ASSESSMENT OF A DEFENDANT'S STATUS AS A "MULTIPLE OFFENDER," REQUISITE TO AN EXTENDED TERM OF IMPRISONMENT PURSUANT TO HRS § 706-662(4)(A), IS TO BE DETERMINED BY THE SENTENCING COURT.*

Kaua argues that the circuit court erred in denying his Rule 35 motion, on the basis that HRS § 706-662(4)(a) is unconstitutional as applied to him and, thus, that the extended indeterminate maximum terms of imprisonment

that the sentencing court imposed upon him in connection with Counts II-IV and VIII-XIII, *see supra* section I, violated his rights under the fifth, sixth, and fourteenth amendments to the United States Constitution and the parallel provisions of the Hawai'i Constitution. More specifically, Kaua contends that (1) the assessment of a defendant's status as a "multiple offender" and (2) the finding that the defendant's "criminal actions were so extensive that a sentence of imprisonment for an extended indeterminate maximum term is necessary for protection of the public," interposed by HRS § 706-662(4)(a), *see supra* note 1, as preconditions to the imposition of an extended indeterminate maximum term of imprisonment, present questions of fact that must be answered by a jury. To support his contention, Kaua relies solely on the United States Supreme Court's decision in *Apprendi,* which, according to Kaua, expressly rejected any distinction between "sentencing factors" and "elements" of an offense, thereby abrogating this court's "intrinsic-extrinsic" analysis enunciated in *Schroeder* and reaffirmed in *Tafoya.* Moreover, Kaua asserts that the prosecution's failure to set forth facts in its charging instrument that, if proven at trial, would support the imposition of an extended term of imprisonment violated his due process right to notice.

The prosecution counters that the sentencing court's imposition of extended term sentences in the present matter did not run afoul of *Apprendi,* and, therefore, that the circuit court did not err in denying Kaua's Rule 35 motion. The prosecution maintains that the *Apprendi* Court did, in fact, draw a distinction between facts relating to "sentencing factors," on the one hand, and "elements" of an offense, on the other, and that only the latter must be determined by the jury. Moreover, the prosecution

asserts that this court's decision in *Tafoya* mandates that the requisite assessments, for purposes of imposing an extended term sentence under HRS § 706-662(4), be made by the sentencing court and not the jury, inasmuch as the facts relating to whether the defendant is a member of the class of offenders to which HRS § 706-662(4) applies are "extrinsic" in nature. We agree with the prosecution.

It is settled that an extended term sentencing hearing is "a separate criminal proceeding apart from the trial of the underlying substantive offense," wherein "all relevant issues should be established by the state beyond a reasonable doubt." *State v. Kamae,* 56 Haw. 628, 635, 548 P.2d 632, 637 (1976). In *State v. Huelsman,* 60 Haw. 71, 588 P.2d 394 (1979), this court addressed the procedural protections to be accorded criminal defendants at an extended term sentencing hearing and announced a two-step process in which a sentencing court must engage in order to impose an extended term sentence. *Id.* at 76, 588 P.2d at 398. For purposes of a motion for an extended term of imprisonment under HRS § 706-662(4), the first step requires a finding beyond a reasonable doubt "that the defendant is a multiple offender, which finding may not be made unless the defendant is being sentenced for two or more felonies or is under sentence for a felony and the maximum terms of imprisonment authorized for the defendant's crimes meet certain requisites." *Id.* In the event that the sentencing court finds that the defendant is a multiple offender under subsection (4), the second step requires the sentencing court to determine whether "the defendant's commitment for an extended term is necessary for the protection of the public." *Id.* at 77, 588 P.2d at 398.

> The determination that the defendant is a member of the class of offenders to which the particular subsection of [HRS] § [706-]662 applies involves "historical facts," the proof of which exposes the defendant to punishment by an extended term sentence, similarly to the manner in which the proof of his guilt exposes him to ordinary sentencing. . . . But when the status of the defendant has been established, the process by which the court determines that the defendant's commitment for an extended term is necessary for the protection of the public . . . is one which deals with the subject matter of ordinary sentencing.

Id. at 79-80, 588 P.2d at 400. As such, the first phase of the *Huelsman* two-step process must afford a defendant "the full panoply of constitutional protections guaranteed in criminal proceedings," *see State v. Melear,* 63 Haw. 488, 498-99, 630 P.2d 619, 627 (1981), which includes the rights to notice and an opportunity to be heard, cross-examination of witnesses appearing at the sentencing hearing, and the evidentiary safeguards set forth in the Hawai'i Rules of Evidence (HRE). *See Kamae,* 56 Haw. at 638, 548 P.2d at 638-39. By contrast, the procedural safeguards to which the second phase of the *Huelsman* two-step process is subject are those applicable to ordinary sentencing, and, therefore, "the HRE are not controlling." *State v. Loa,* 83 Hawai'i 335, 355, 926 P.2d 1258, 1278 (1996). Moreover, "[u]nder ordinary sentencing procedures, the court is 'afforded wide latitude in the selection of penalties from those prescribed and in the determination of their severity. This authority is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory and constitutional

commands have not been observed.'" *State v. Okumura*, 78 Hawai'i 383, 413, 894 P.2d 80, 110 (1995).

In *Schroeder*, this court addressed the question whether the defendant had a due process right to reasonable notice of the circuit court's intention *sua sponte* to impose a mandatory minimum prison term, pursuant to HRS § 706-660.1 (1993),[7] as an element of the defendant's sentence arising out of his conviction of *kidnapping* under circumstances in which the prosecution had affirmatively sought only the imposition of a mandatory minimum sentence in connection with the defendant's *robbery* conviction. *Schroeder*, 76 Hawai'i at 530-32, 880 P.2d at 205-07. The defendant argued on appeal that the mandatory minimum sentence imposed in connection with the kidnapping conviction was illegal, because (a) the indictment did not give him notice of the possibility of an enhanced sentence based on HRS § 706-660.1 and (b) at sentencing, the circuit court did not find beyond a reasonable doubt the "aggravating circumstances" requisite to a mandatory minimum sentence under HRS § 706-660.1 –

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[7] HRS § 706-660.1 provides in relevant part:

> **Sentence of imprisonment for use of a firearm, semi-automatic firearm, or automatic firearm in a felony.** (1) A person convicted of a felony, where the person had a firearm in the person's possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:
>
> . . . .
>
> (b) For a class A felony – up to ten years. . . .

i.e., the use or threat of using a firearm during the commission of a felony. *Id.* at 522, 880 P.2d at 197. In rendering its opinion, this court compared and contrasted the analysis set forth in *Huelsman*, on the one hand, and *State v. Estrada*, 69 Haw. 204, 738 P.2d 812 (1987), on the other, in order to glean their application to the parameters governing the imposition of an enhanced sentence. In doing so, this court distinguished between the nature of the "aggravating circumstances" germane to HRS § 706-662 (extended term sentencing) and those germane to HRS § 706-660.1 (sentence of imprisonment for use of a firearm).

> [T]wo aspects of the *Huelsman* rule are significant. First, the "historical facts" pertinent to the imposition of extended prison terms pursuant to HRS § 706-662 are to be found by the sentencing court *after* the defendant's adjudication of guilt at trial by the trier of fact. Second, this particular fact-finding process is wholly independent of the allegation of any foundational "aggravating circumstances" in the indictment or complaint containing the charges against the defendant. *See Oyler v. Boles*, 368 U.S. 448, 452, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). This is precisely why *[State v.] Apao*, [59 Haw. 625, 586 P.2d 250 (1978),] which did not involve HRS § 706-662 extended term sentencing, received no mention in *Huelsman* and why the *Estrada* court construed *Huelsman* as recognizing that such extended term sentencing was subject to "different procedures" than those applicable to other forms of "enhanced" sentencing. *See Estrada*, 69 Haw. at 230, 738 P.2d at 829.
>
> In short, the *Huelsman* rule is limited to enhanced sentencing, such as extended prison

> terms pursuant to HRS §§ 706-661, 706-662, and 706-664, in which the "determination that the defendant is a member of the class of offenders to which the particular [statute] applies involves 'historical facts.'" *Huelsman,* 60 Haw. at 79, 588 P.2d at 400. This is because such "historical facts" are wholly *extrinsic* to the specific circumstances of the defendant's offense and therefore have no bearing on the issue of guilt *per se.* By contrast, if the "aggravating circumstances" justifying the imposition of an enhanced sentence are "enmeshed in," or, put differently, *intrinsic* to the "commission of the crime charged," then, in accordance with the *Estrada* rule, such aggravating circumstances "*must* be alleged in the indictment in order to give the defendant notice that they will be relied on to prove the defendant's guilt and support the sentence to be imposed, and they must be determined by the trier of fact." *[State v.] Schroeder,* [10 Haw.App. 535, 545,] 880 P.2d [208, 212 (1992)].

Schroeder, 76 Hawai'i at 528, 880 P.2d at 203 (some brackets added and some in original) (emphasis in original). This court ultimately agreed with the ICA's holding that the *Estrada* rule applied to the defendant's appeal, inasmuch as the "aggravating circumstances" at issue – *i.e.,* the use or threat to use a firearm during the commission of a felony – were so "enmeshed" in the charged offenses that such circumstances should have been alleged in the charging instrument and determined by the trier of fact.

Five years later, in *Tafoya,* this court revisited the distinction between "extrinsic" and "intrinsic" facts, as addressed in *Schroeder,* in deciding whether the factual finding requisite to the imposition of an enhanced sentence pursuant to HRS § 706-662(5), *see supra* note 1,

must be made by the trier of fact or the sentencing court. *Tafoya,* 91 Hawai'i at 269-70, 982 P.2d at 898-99.

> In reviewing our previous case law, it is apparent that "intrinsic" factors, required to be pled in the indictment and found by the jury, are distinguishable in that they are contemporaneous with, and enmeshed in, the statutory elements of the proscribed offense. Contrarily, "extrinsic" factors are separable from the offense itself in that they involve consideration of collateral events or information. Occurrence at a prior time is indicative, although not dispositive, of a conclusion that a factor is "extrinsic."

Id. at 271, 982 P.2d at 900 (footnote omitted). This court held "that findings regarding (a) the age or handicapped status of the victim and (b) whether '[s]uch disability is known or reasonably should be known to the defendant' entail 'intrinsic' facts" that are so "inextricably enmeshed in the defendant's actions in committing the offense charged . . . that the Hawai'i Constitution requires that these findings be made by the trier of fact[.]" *Id.* at 271-72, 982 P.2d at 900-01. *Tafoya,* therefore, overruled *Huelsman* to the extent that the blanket rule that *all* factual findings implicated in HRS § 706-662 were to be made by the sentencing judge no longer applied to subsection (5), thereby underscoring the point that the requirement that "intrinsic" facts must be determined by the trier of fact for purposes of extended term sentencing "rests upon the necessity of upholding a defendant's constitutional rights to trial by jury and procedural due process." *Id.*

Tafoya also reviewed the pertinent federal authority touching upon the constitutional validity of allowing a sentencing judge to make factual findings with respect to

the imposition of an enhanced sentence. 91 Hawai'i at 272-73, 982 P.2d at 901-02. In *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the United States Supreme Court addressed the question whether certain provisions of a car-jacking statute, which prescribed enhanced sentencing penalties, created additional elements of the offense, which would have to be found by the jury, or merely described sentencing considerations, which could permissibly be determined by the sentencing judge. In concluding the former, the *Jones* Court essentially drew a distinction, as this court did in *Schroeder* and *Tafoya,* between (1) factual findings that were inextricably enmeshed in the charged offense and therefore probative of the defendant's commission of that offense and (2) factual findings that were wholly independent of the offense charged in the indictment and spoke only to characteristics of the defendant that were pertinent to the appropriate degree of punishment. The *Jones* Court noted that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." 526 U.S. at 232, 119 S.Ct. 1215. Thus, *Jones* declared that "any fact (other than [a] prior conviction) that increased the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243, 119 S.Ct. 1215 n. 6. *Tafoya* recognized, however, that to extend the *Jones* rationale to "extrinsic" facts "would contaminate the jury's required focus on the factual circumstances surrounding the [charged] offense and potentially require the introduction of inadmissible prior bad act or overly prejudicial evidence to require the jury to

make such findings." *Tafoya,* 91 Hawai'i at 273 n. 15, 982 P.2d at 902 n. 15.

The United States Supreme Court decided *Apprendi* almost ten months after our decision in *Tafoya.* At issue in *Apprendi* was a New Jersey "hate-crime" law,[8] which provided for the imposition of an enhanced sentence based upon a finding, to be made by the sentencing judge by a preponderance of the evidence, that the charged offense was committed with a biased purpose. *Apprendi,* 530 U.S. at 468-70, 120 S.Ct. 2348. The United States Supreme Court held the New Jersey law unconstitutional, emphasizing that the "relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494, 120 S.Ct. 2348. In other words, a finding that the defendant committed the charged offense with a biased purpose, of necessity, required an assessment of the "elemental" facts upon which the indictment was based. That being the case, the *Apprendi* Court held that findings that implicated "elemental" facts requisite to imposing an enhanced sentence must be charged in the indictment, submitted to the jury, and proved by the prosecution beyond a reasonable doubt.[9] *Id.*

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[8] HRS § 706-662(6), *see supra* note 1, which provides for the imposition of an extended term of imprisonment based on the defendant's status as a "hate crime offender," is similar in substance to the New Jersey hate-crime statute at issue in *Apprendi. See* N.J. Stat. Ann. § 2C:44-3(e) (West Supp.1999-2000) (providing for an extended term of imprisonment if the trial judge finds, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimate [sic] an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity").

[9] The United States Supreme Court reaffirmed its holding in *Apprendi* in *Ring v. Arizona,* 536 U.S. 584, 608-09, 122 S.Ct. 2428, 153

(Continued on following page)

at 490, 120 S.Ct. 2348; *accord Estrada* 69 Haw. at 230, 738 P.2d at 829 (relying on *State v. Apao,* 59 Haw. 625, 586 P.2d 250 (1978), *subsequent resolution,* 66 Haw. 682, 693 P.2d 405 (1984), in holding that "aggravating circumstances which, *if proved,* would result in the application of enhanced sentencing" must be alleged in the indictment and found by the jury) (emphasis in original); *compare Almendarez-Torres v. United States,* 523 U.S. 224, 226-27, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (holding that a statutory subsection authorizing an enhanced sentence based on the defendant's prior conviction constituted a "penalty provision," and not a separate offense, and that only the latter must be alleged in the charging instrument and proved by the prosecution beyond a reasonable doubt).

In *State v. Carvalho,* 101 Hawai'i 97, 63 P.3d 405 (App. 2002), the Intermediate Court of Appeals (ICA) addressed the questions whether, in light of *Apprendi,* HRS § 706-662 was unconstitutional on its face and whether *Apprendi* required a jury to make the requisite findings under HRS §§ 706-662(1) and (4) in order to support an extended term sentence. The ICA, reading *Tafoya* to be in harmony with *Apprendi,* held that HRS § 706-662 was not constitutionally infirm:

> Under HRS §§ 706-662(1) and (4), the sentencing judge first finds the facts relating to the defendant's prior felony convictions that place the defendant within the class of offenders subject to extended term sentencing, . . . "the proof of which *exposes* the defendant to punishment by an extended term sentence, similarly to the manner in

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L.Ed.2d 556 (2002) (overruling *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)).

> which the proof of his guilt *exposes* him to ordinary sentencing."

Carvalho, 101 Hawai'i at 111, 63 P.3d at 419 (quoting *Huelsman,* 60 Haw. at 79, 588 P.2d at 400) (emphasis in original).

Although *Carvalho* focused primarily on HRS §§ 706-662(1) and (4), which set forth the prerequisites to an extended term of imprisonment based on the defendant's status as a persistent or multiple offender, the decision showcases the fundamental distinction between the nature of the predicate facts described in HRS §§ 706-662(1), (3), and (4), *see supra* note 1 on the one hand, and those described in HRS §§ 706-662(5) and (6), *see id.,* on the other. Specifically, the facts at issue in rendering an extended term sentencing determination under HRS §§ 706-662(1), (3), and (4) implicate considerations completely "extrinsic" to the elements of the offense with which the defendant was charged and of which he was convicted; accordingly, they should be found by the sentencing judge in accordance with *Huelsman* and its progeny. The facts at issue for purposes of HRS §§ 706-662(5) and (6), however, are, by their very nature, "intrinsic" to the offense with which the defendant was charged and of which he has been convicted; accordingly, they must be found beyond a reasonable doubt by the trier of fact in order to afford the defendant his constitutional rights to procedural due process and a trial by jury. *Tafoya,* 91 Hawai'i at 271-72, 982 P.2d at 900-01; *Schroeder,* 76 Hawai'i at 528, 880 P.2d at 203.

In light of the foregoing, we cannot accept Kaua's argument that *Apprendi* mandates that a "multiple offender" determination, for purposes of HRS § 706-662(4)(a),

must be made by the trier of fact and, therefore, that the circuit court's order denying his Rule 35 motion was unconstitutional. The facts foundational to Kaua's extended terms of imprisonment in connection with Counts II-IV and VIII-XIII, pursuant to HRS § 706-662(4)(a), fell outside the *Apprendi* rule, and, thus, the ultimate finding that he was a "multiple offender" whose extensive criminal actions warranted extended prison terms was properly within the province of the sentencing court. 530 U.S. at 490, 120 S.Ct. 2348; *Carvalho,* 101 Hawai'i at 111, 63 P.3d at 419.

Moreover, a review of the record on appeal supports the circuit court's FOFs and COLs with respect to the sentencing court's imposition of extended term sentences in connection with Counts II-IV and VIII-XIII. First, at the hearing on the prosecution's motion for extended terms of imprisonment, Kaua stipulated to the fact that he was a "multiple offender," for purposes of HRS § 706-662(4)(a), thereby conceding that he had satisfied the first step of the *Huelsman* two-step process for the imposition of an extended term sentence. Second, the sentencing court rendered extensive findings – *i.e.,* Kaua's history of alcohol and substance abuse, assaultive and threatening behavior (which included abuse of a household member and terroristic threatening), and access and use of firearms – to support its conclusion that Kaua's "criminal actions were so extensive that a sentence of imprisonment for an extended term [was] necessary for protection of the public." Thus, inasmuch as the sentencing court's imposition of extended maximum indeterminate terms of imprisonment in connection with Counts II-IV and VIII-XIII passed muster under the Hawai'i and United States Constitutions, the circuit court did not err in denying Kaua's Rule 35 motion.

IV. *CONCLUSION*

In light of the foregoing, we affirm the circuit court's findings of fact, conclusions of law, and order denying Kaua's Rule 35 motion, filed on May 6, 2002.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WAYMAN KAUA, Petitioner-Appellee, V. CLAYTON FRANK, Warden, Halawa Correctional Facility; STATE OF HAWAII, Respondents-Appellants.	No. 05-15059 D. C. No. CV-03-00432-SOM/BMK District of Hawaii, Honolulu ORDER

Before: TROTT, T.G. NELSON, and PAEZ, Circuit Judges.

Appellants' "Petition for Rehearing En Banc" is DENIED.

UNITED STATES COURT OF APPEALS

FOR NINTH CIRCUIT

WAYMAN KAUA, Petitioner-Appellee, v. CLAYTON FRANK, Warden, Halawa Correctional Facility; et al., Respondents-Appellants.	No. 05-15059 D. C. No. CV-03-00432-SOM/BMK **JUDGMENT** (Filed Mar. 06, 2006)

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered Wednesday, January 11, 2006

HRS § 706-606 Factors to be considered in imposing a sentence.

The court, in determining the particular sentence to be imposed, shall consider:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence imposed:

(a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;

(b) To afford adequate deterrence to criminal conduct;

(c) To protect the public from further crimes of the defendant; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) The kinds of sentences available; and

(4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

HRS § 706-661 Sentence of Imprisonment for felony; extended terms.

In the cases designated in section 706-662, a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment. When ordering such a sentence, the court shall impose the

maximum length of imprisonment which shall be as follows:

(1) For murder in the second degree – life without the possibility of parole;

(2) For a class A felony – indeterminate life term of imprisonment;

(3) For a class B felony – indeterminate twenty-year term of imprisonment; and

(4) For a class C felony – indeterminate ten-year term of imprisonment.

The minimum length of imprisonment for [paragraphs] (2), (3), and (4) shall be determined by the Hawaii paroling authority in accordance with section 706-669.

HRS § 706-662 Criteria for extended terms of imprisonment.

A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:

(1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.

(2) The defendant is a professional criminal whose imprisonment for an extended term is necessary for

protection of the public. The court shall not make this finding unless:

(a) The circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood; or

(b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous person whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-related data in order to establish dangerousness in accord with the Hawaii rules of evidence.

(4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:

(a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or

(b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or

exceed forty years if the extended term imposed is for a class A felony.

(5) The defendant is an offender against the elderly, handicapped, or a minor under the age of eight, whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:

(a) The defendant attempts or commits any of the following crimes: murder, manslaughter, a sexual offense that constitutes a felony under chapter 707, robbery, felonious assault, burglary, or kidnapping; and

(b) The defendant, in the course of committing or attempting to commit the crime, inflicts serious or substantial bodily injury upon a person who is:

(i) Sixty years of age or older;

(ii) Blind, a paraplegic, or a quadriplegic; or

(iii) Eight years of age or younger; and

(c) Such disability is known or reasonably should be known to the defendant.

(6) The defendant is a hate crime offender whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:

(a) The defendant is convicted of a crime under chapter 707, 708, or 711; and

(b) The defendant intentionally selected a victim, or in the case of a property crime, the property that was the object of a crime, because of hostility toward the

actual or perceived race, religion, disability, ethnicity, national origin, gender identity or expression, or sexual orientation of any person. For purposes of this subsection, "gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression; regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.